

1998

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Benjamin C. Zipursky  
*Fordham University School of Law*

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### Recommended Citation

Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 Fordham L. Rev. 649 (1998).

Available at: <https://ir.lawnet.fordham.edu/flr/vol67/iss2/13>

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### Cover Page Footnote

Associate Professor, Fordham University School of Law; B.A. 1982, Swarthmore College; Ph.D. (Philosophy) 1987, University of Pittsburgh; J.D. 1991, New York University. I am grateful to Mary Daly, John Goldberg, Bruce Green, Michael Martin, Russell Pearce, Arthur Ripstein, and Tanina Rostain for helpful comments on previous drafts, and to Maria Rivera and Allison Lucas for their research assistance. This research was supported by a Fordham University Summer Research Grant.

# LEGAL MALPRACTICE AND THE STRUCTURE OF NEGLIGENCE LAW

Benjamin C. Zipursky\*

## INTRODUCTION

THE legal academy is currently edified by interdisciplinary unions—law and economics, law and philosophy, law and science, law and literature, to name but a few. At the same time, however, it overlooks important connections between different subdivisions within legal scholarship. This symposium is *intradisciplinary* in just that sense. It aims to shed light on familiar substantive areas of law by looking at them through the prism of legal and ethical problems that concern scholars of the legal profession. One hopes that the light shed on other areas will reflect back on the profession itself, helping to elucidate its proper role in society, and to illuminate our profession's current struggle to retain self-esteem in the face of mounting external and internal criticism.

This Article explores both the law of torts and the legal profession by focusing on an important area of overlap between the two—the law of attorney malpractice. I shall argue that the most widely accepted model of negligence law, put forth in William S. Prosser's *Hornbook*,<sup>1</sup> cannot adequately interpret the key concepts of duty and breach in the law of attorney malpractice. Though particularly striking when viewed in the context of attorney negligence, these deficiencies pervade the Prosserian model in all areas of negligence law. Building upon earlier work of my own and with John Goldberg<sup>2</sup> that introduces a “relational” model of negligence law to replace the Pros-

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\* Associate Professor, Fordham University School of Law; B.A. 1982, Swarthmore College; Ph.D. (Philosophy) 1987, University of Pittsburgh; J.D. 1991, New York University. I am grateful to Mary Daly, John Goldberg, Bruce Green, Michael Martin, Russell Pearce, Arthur Ripstein, and Tanina Rostain for helpful comments on previous drafts, and to Maria Rivera and Allison Lucas for their research assistance. This research was supported by a Fordham University Summer Research Grant.

1. See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* (5th ed. 1984) [hereinafter *Prosser & Keeton*]. Because this treatise is a revision of what was originally written by Prosser alone, William S. Prosser, *Handbook on the Law of Torts* (1941) [hereinafter *Prosser, Handbook*], I will typically refer to the view expressed therein as “Prosser’s” view, even though different scholars have edited the revised version.

2. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *Vand. L. Rev.* 1 (1998) (identifying and analyzing the idea of rights, duties, and relational wrongs in tort law); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 147 *U. Pa. L. Rev.* 1733 (1998) (offering a broad critique of the Prosserian conception of duty in negligence law and developing the relational model); see also Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *Philosophy in the U.S. Law of Torts* (Gerald Postema ed., forthcoming 1998) (using a relational conception of duty to explain the causation requirement).

serian model, this Article argues that the relational model better captures legal malpractice law and the tort of negligence in general.

Part I sets forth Prosser's model of negligence law and identifies a variety of problems with this model. Part II focuses on a core aspect of Prosser's view—his treatment of duty—and argues against that analysis. It also sketches the relational account of duty and, correspondingly, an alternate model of negligence law. Part III turns to the subject of attorney malpractice, arguing that the Prosserian conception inadequately addresses the subjects of duty and breach in this context. The relational model I outline, however, makes sense of both. Part IV further proposes that the relational model is, in fact, consistent with the Proposed Restatement's categorical approach toward attorney-liability to non-clients.<sup>3</sup> Part V maintains that attorney malpractice is not atypical of negligence law, and that the Prosserian concept of duty is equally inappropriate in other areas of the law. I conclude by suggesting that a relational model, while providing a more defensible interpretation of tort law, may also provide an understanding of the nature of law that is more commensurate with a healthy self-image for lawyers.

## I. THE PROSSERIAN MODEL OF NEGLIGENCE LAW

### A. *Prosser's Basic Model*

It is well established that a cause of action in negligence is composed of four elements: duty, breach, causation (actual and proximate), and injury.<sup>4</sup> First-year torts classes are typically devoted to teaching what these elements—particularly duty, breach, and proximate cause—really mean. The answer is ultimately a hodge-podge of various policy considerations, to which different courts assign various “weights” in various cases. Some judges, like Cardozo, rhapsodize in a moralistic and magisterial turn of phrase,<sup>5</sup> while others, like Hand,<sup>6</sup> Andrews,<sup>7</sup> Traynor,<sup>8</sup> and Posner,<sup>9</sup> cut to the chase and clearly identify the competing policy interests at stake in appellate torts decisions.

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3. See Restatement (Third) of the Law Governing Lawyers § 73 (Tentative Draft No. 8, 1997).

4. See Prosser & Keeton, *supra* note 1, § 30, at 164-65.

5. See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (“Negligence in the abstract, apart from things related, is surely not a tort . . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports a violation of a right . . .”); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (“We have put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.”).

6. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“Duty . . . is a function of three variables: (1) the probability . . . ; (2) the gravity of the resulting injury . . . ; (3) the burden of adequate precaution.”).

7. See, e.g., *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) (“Negligence may be defined . . . as an act or omission which unreasonably . . . affect[s] the rights of others.”).

Understanding tort law requires one to learn how most courts have decided that these elements apply to various categories of cases, what sorts of considerations they have deemed relevant, and how the law has changed and continues to change. Perhaps most importantly, it includes learning how to craft arguments to fit within these categories and within the concededly thin shell of the conceptual framework of negligence.

What is in this "shell" of a conceptual framework? Overwhelmingly, the legal academy accepts a Prosserian answer to this question.<sup>10</sup> Prosser's central concept—and the central element of negligence law—is the negligent act itself, or "breach." Breach can be understood as the failure to act "reasonably," the failure to take "reasonable care," or the failure to take the care that a "reasonable person" would take.<sup>11</sup> Though it originated in Holmes's work,<sup>12</sup> the concept of a duty of reasonable care has been enormously influenced by Richard Posner's economic theory of tort law,<sup>13</sup> which in turn draws upon the famous "Hand" formula of *United States v. Carroll Towing Co.*<sup>14</sup> Under this formula, reasonable care requires taking those precautions whose cost is less than the product of the risk (probability) that injury will occur without those precautions and the cost inflicted by those injuries.<sup>15</sup>

The Prosserian view also recognizes that custom, notice, and statutory law can be relevant to what constitutes breach, but these are typically treated as merely heuristics for the ultimate "Hand" standard.<sup>16</sup> Some scholars regard the Hand standard as black letter law, while others question whether its economic calculus really captures the concept of a reasonable person.<sup>17</sup> But even including the less reductionistic, the majority retain a Prosserian posture, understanding breach in terms of deviation from the standard of "reasonable care," judging the "reasonableness" of the risk-creation from within a framework that

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8. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) ("It should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . [has] a defect that causes injury . . .").

9. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 33 (1972) ("Perhaps . . . the dominant function of the fault system is to generate rules of liability that . . . will bring about . . . the efficient level . . . of accidents and safety.").

10. See, e.g., Kenneth S. Abraham, *The Forms and Functions of Tort Law* 225 (1997); John L. Diamond et al., *Understanding Torts* 45-46 (1996).

11. See Restatement (Second) of Torts § 282 (1965).

12. See Oliver Wendell Holmes, Jr., *The Common Law* 105-13 (Dover ed. 1991) (1881).

13. See Posner, *supra* note 9, at 32.

14. 159 F.2d 169 (2d Cir. 1947).

15. See *id.* at 173.

16. See Prosser & Keeton, *supra* note 1, § 33, at 193-208.

17. See, e.g., Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 Stan. L. Rev. 311, 312-13 (1996) (arguing that negligence embraces a general standard of due care derived from a Rawlsian idea of reasonableness).

balances social costs and benefits, and viewing traditional linkages of custom, notice, and statute, as principally evidentiary or heuristic.

Obviously, unreasonable conduct alone does not give rise to a cause of action in negligence. At a minimum, plaintiff must also allege some cognizable injury and, putting aside the possibility of courts softening evidentiary standards, show that the negligent conduct caused her injury. A mental snapshot of the "typical tort of negligence" might be a defendant speeding through a residential neighborhood and hitting a child crossing the street. Our picture includes the negligent conduct, injury, and causation. This "snapshot" also poses difficult questions: aren't breach, actual causation, and injury enough for a negligence claim? Why is there a "duty" element? Why is there a "proximate cause" sub-element of causation—why isn't "actual causation" sufficient? These are the richest and the messiest questions of negligence law. Before providing the "standard" answer, it is important to note just how pressing these questions become when we look at the law from the widely adopted instrumentalist point of view.

Prosser understood the central function of tort law to be compensation of those injured.<sup>18</sup> Following Holmes, and acutely aware that the tort law was not traditionally intended to be a "general insurance scheme,"<sup>19</sup> Prosser believed that our tort system did not aim at compensating *all* injuries—only those (significant) injuries that were caused by unreasonable conduct. While this limitation served as a *constraint*, protecting innocent persons from the imposition of liability, it also, in a more forward-looking sense, permitted the tort law to deter unreasonable conduct, creating the possibility of liability if harm should result from such conduct.<sup>20</sup> Hence, the purpose of tort law is two-fold—compensation and deterrence. While still-ascendant views of law and economics, such as Landes & Posner's<sup>21</sup> and Shavell's,<sup>22</sup> view tort law as principally deterrent, other important economic views, such as Calabresi's<sup>23</sup> and Priest's,<sup>24</sup> leave substantial room for both functions.

According to Holmes, Prosser, Posner, or Calabresi's views, the unreasonable conduct causing serious injury presents a *prima facie* case for liability on functionalist grounds. The injury needs to be compen-

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18. See Prosser & Keeton, *supra* note 1, § 1, at 5-6.

19. See Holmes, *supra* note 12, at 96.

20. See Prosser & Keeton, *supra* note 1, § 1, at 5-6.

21. See William Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987) (espousing the positive economic theory of tort law).

22. See Steven Shavell, *Economic Analysis of Accident Law* (1987) (discussing liability for accidents).

23. See Guido Calabresi, *The Costs of Accidents* (1970) (discussing cost-shifting and cost-reduction principles in tort law).

24. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985) (discussing enterprise liability).

sated and it flows from the sort of conduct that ought to be deterred. Indeed, the economic view sharpens the case, suggesting that if we wish persons similarly situated to select a reasonable course of conduct, then we should force the person engaging in that conduct to internalize that cost. The concepts of "duty" and "proximate cause" are alien to the normative structure of these views.

Perhaps the most eloquent judicial explanation of the "proximate cause" requirement is Judge Andrews's dissent in *Palsgraf v. Long Island Railroad*.<sup>25</sup> His point is that "actual causation" is simply too weak a requirement, because the actual consequences of an unreasonable act extend indefinitely. From a practical perspective, however, liability in negligence must not extend indefinitely. The smallest deviation from due care would impose unlimited liability and foster endless litigation. As economic scholars have noted, people would exercise wasteful levels of care and expend unreasonable energy to anticipate a potentially unlimited scope of liability.<sup>26</sup> There would also be wasteful expenditures in efforts to anticipate the long range of liability.<sup>27</sup> Moreover, even Prosser and other primarily utilitarian scholars recognize that the "fairness"-based idea that a loss may be shifted to one whose unreasonable conduct caused the loss must be limited where the causal nexus or the proportionality between the unreasonableness and the loss becomes too attenuated.<sup>28</sup> Hence, while a proximate cause limitation is not necessary to *complete* the case for imposing liability, if tort law is to serve its functions of compensation and deterrence, then it is necessary to *constrain* liability and avert a wide variety of counterproductive social consequences.<sup>29</sup>

Ironically, the academic success of this account of "proximate cause" has exacerbated the difficulty of explaining the "duty" element of negligence law.<sup>30</sup> If "breach-actual-cause-injury" succeeds in accomplishing the functions of compensation and deterrence, and if "proximate cause" can be used as a catch-all constraint to ensure that liability is properly limited, then is there any point in having a "duty" element? Many prominent scholars have answered no—duty is a fifth wheel that simply obscures the structure of negligence law and improperly permits defendants to escape liability under formalistic ver-

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25. 162 N.E. 99, 101-05 (N.Y. 1928) (Andrews, J., dissenting).

26. See, e.g., Landes & Posner, *supra* note 21, at 247 (acknowledging the possibility of "inducing too much care").

27. See *id.*

28. See Prosser & Keeton, *supra* note 1, § 43, at 281-82.

29. See *id.*

30. See, e.g., Landes & Posner, *supra* note 21, at 246-47 (examining the role of proximate cause in negligence law); John T. Noonan, Jr., *Persons and Masks of the Law*: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks 134-39 (1976) (criticizing abstractness and unreality of Cardozo's opinion); Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 Iowa L. Rev. 363 (1984) (explaining a novel theory about the role of proximate cause in negligence law).

biage.<sup>31</sup> Indeed, Prosser's work exhibits a broad strand of this type of thinking.<sup>32</sup>

The concept of "duty" in negligence law has been the object of a number of different critiques, collected and synthesized in Prosser's Hornbook. Prosser, following Holmes, harbored deep intellectual hostility to notions of "duty" and "right," insisting that they were vague, meaningless, indeterminate, and question-begging.<sup>33</sup> Accepting Percy Winfield's arguments, he considered the concept of duty to be redundant of "breach," for the finding of breach is implicitly a finding that the duty of due care was breached.<sup>34</sup> He similarly agreed with Andrews that the only "real" duty was a duty to act reasonably toward the world. He faulted the "duty" element for the unjustifiable and regressive denials of liability to injured plaintiffs in the Industrialist Era of the nineteenth century. Yet he recognized that courts were not about to abolish the duty element entirely and desired to "restate" the law in a manner that was usable for courts. Thus, Prosser developed a revisionary account of duty that provided some place for it in negligence law, avoiding what he considered the formalistic and regressive traps of his predecessors.<sup>35</sup>

The Prosserian account of duty was inspired by the work of Leon Green.<sup>36</sup> Green's central insight into "duty" was functionalist: by labeling an issue a "duty" issue, a court authorizes the removal of that issue from the jury and decides it on its own.<sup>37</sup> Both causation and proximate cause, as an aspect of causation, are (in the first instance) questions of fact for the jury.<sup>38</sup> Juries' case-by-case determinations of "proximate cause" cannot satisfactorily control the deleterious social consequences that can flow from too much litigation and liability imposition. In order to protect society and the legal system, courts may have to interpose and exclude categories of negligently caused injury cases. According to the Prosserian view, that is the real function of the "no duty" category.<sup>39</sup> "No duty" is merely a rhetorical device that

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31. See Noonan, *supra* note 30, at 134-39.

32. See William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953), reprinted in William L. Prosser, *Selected Topics on the Law of Torts* 191, 213-15 (1954).

33. See Goldberg & Zipursky, *supra* note 2, Part I.B.

34. Prosser & Keeton, *supra* note 1, § 53, at 357 (citing Percy Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 41, 43 (1934)).

35. See Goldberg & Zipursky, *supra* note 2, Part I.B.3.

36. See Leon Green, *The Duty Problem in Negligence Cases*, 28 Colum. L. Rev. 1014 (1928).

37. See *id.* at 1030.

38. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 105 (N.Y. 1928) (Andrews, J., dissenting). Of course, many proximate cause questions are disposed of by the court, but only because many courts often exercise an aggressive supervisory function on this issue, and not because it is an issue treated as a matter of law for categories of cases.

39. See Goldberg & Zipursky, *supra* note 2, Part I.B.3.



enables courts to deny causes of action for negligently caused injury in certain categories of cases.

### B. *Shortcomings of the Prosserian View*

The Prosserian view is literally "Hornbook law," but that phrase obviously conceals an ambiguity. Although Prosser and Keeton's treatise is surely instructive, it is certainly not legally authoritative; and though it may correctly summarize the content of the law in many categories of cases and causes of action, it hardly follows that the Prosserian *theory* of the conceptual structure of the law is authoritative in any sense. Indeed, Prosser's account of the structure of negligence law is thoroughly unsatisfactory. This Article shall focus on some—but not all—of those shortcomings. My primary aim is to cast doubt on Prosser's view as an interpretation of the actual structure of negligence law, not to challenge it from a prescriptive point of view.<sup>40</sup>

The Hand standard's conception of the reasonable person faces serious difficulties as a positive account of the law.<sup>41</sup> To begin with, it is virtually never included in jury instructions in negligence cases.<sup>42</sup> Rather, juries are usually instructed to consider whether the defendant acted as a "reasonably prudent" or "reasonably careful" person would have acted under the circumstances, or whether the defendant used "ordinary care."<sup>43</sup> Moreover, it is quite rare to find appellate courts considering the Hand standard when they review decisions on "breach." Such a standard, in fact, conflicts with the prominent English case of *Bolton v. Stone*.<sup>44</sup> Gregory Keating has pointed out that the Hand standard itself does not favor an economic account over a social contractarian one.<sup>45</sup>

More importantly, the Hand standard fails to capture many of the sorts of factors that juries and courts do, in fact, consider when evalu-

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40. See Zipursky, *supra* note 2, at 93-98 (distinguishing the theory that describes normative underpinnings of tort law from prescriptive theory).

41. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015, 1018 (1994). Gilles' article responds, in part, to four other articles that question the Hand formula account of negligence. See Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 Clev. St. L. Rev. 315, 379-89 (1990) (arguing that community convention and custom, not risk/utility analysis, play an intrinsic role in defining negligence); Richard S. Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 Hofstra L. Rev. 811, 831-32 (1980) (arguing that the Hand standard misses important aspects of negligence); Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 Minn. L. Rev. 277, 306-08 (1984) (arguing the Hand formula fails to explain negligence law adequately); Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2383-90 (1990) (arguing that jurors draw pragmatically upon community norms in deciding negligence).

42. See Gilles, *supra* note 41, at 1029-32.

43. See *id.* at 1019 n.10.

44. 1951 App. Cas. 850.

45. See Keating, *supra* note 17, at 341-45 (arguing that negligence embraces a general standard of due care derived from a Rawlsian idea of reasonableness).

ating breach.<sup>46</sup> Custom, notice, statutory compliance, and diligent efforts are all highly probative to a fact-finder, and they are frequently examined by courts.<sup>47</sup> These may or may not be connected with risk, probability, and injury. Economic scholars have tended to treat the problem as of secondary significance, if at all,<sup>48</sup> while conventional instrumentalists have simply satisfied themselves by commenting on the limitations of theory.<sup>49</sup> But though contemporary tort scholarship is caught in the grip of a particular view of breach, and though that view bears the credentials of clarity, simplicity, and connectedness with a grand theory, it is highly questionable whether that view coheres with the content and concepts of breach in our actual case law.

Proximate cause fares no better. Though contemporary tort scholars treat *Palsgraf* as the leading "proximate cause" case<sup>50</sup> and Cardozo as our leading torts judge, Cardozo's opinion insists that both actual and proximate causation have nothing to do with the case.<sup>51</sup> Moreover, tremendous tension exists between Prosser's endorsement of Andrews's position and the positions of Leon Green and Robert Keeton, which give a prominent place to the "risk rule" in proximate cause analysis.<sup>52</sup> Prosser's account fails to leave a distinctive place for "superseding cause" in proximate cause analysis,<sup>53</sup> and it puts enormous weight on the notion of foreseeability. Yet Prosser relies on foreseeability in both the breach and "duty" analyses, without ever explaining the meaning of the term or its differences in either context.<sup>54</sup>

Above all, Prosser's conception of duty has proved both inaccurate and unworkable. The law frequently defines "duty" as actual "duty" or "obligation." Courts that deny liability in nonfeasance cases for lack of duty seem to be saying that, while it might have been commendable for the defendant to help the plaintiff, the defendant was not *obligated* to do so.<sup>55</sup> Similarly, courts that deny recovery to injured trespassers despite landowners' failure to take due care are not simply saying that a contrary holding would impose too much liability; rather, they are saying that landowners are not obligated to watch out for the interests of those who trespass upon their land.<sup>56</sup> A court that tells a manufacturer it *does* have a duty to watch out for those who will suffer foreseeable serious injury from the unchecked defects of its

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46. See Gilles, *supra* note 41, at 1041-52.

47. See Prosser & Keeton, *supra* note 1, §§ 33-36, at 193-233.

48. But see, e.g., Landes & Posner, *supra* note 21, at 131-39.

49. See Smith, *supra* note 41, at 306-08; Wells, *supra* note 41, at 2383-90.

50. See Goldberg & Zipursky, *supra* note 2, at Part II.

51. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928).

52. See Robert E. Keeton, *Legal Cause in the Law of Torts* 79-86 (1963).

53. See Prosser, *supra* note 32, at 222-28.

54. See *id.* at 209-15.

55. See Goldberg & Zipursky, *supra* note 2, at Part IV.B.2.

56. See *Carrington v. Louisville & N.R. Co.*, 6 So. 910, 911 (Ala. 1889) (holding that a landowner owes no duty to a trespasser absent a reason to expect his presence).

products is saying that the manufacturer is obligated to watch out for injuries to those persons.<sup>57</sup> Likewise, a court that makes psychotherapists liable for injuries caused by their patients to *identifiable* third parties is telling psychiatrists that their obligations extend only to those whom they can identify.<sup>58</sup>

In these cases, and in a wide variety of emotional and economic harm cases, "duty" means something.<sup>59</sup> To be sure, courts are making a sort of policy judgment when they decide upon "duty" or "no duty," but the word "duty" is not merely a placeholder. Courts are primarily deciding whether it is plausible to think of the defendant as obligated to take a certain sort of care toward the plaintiff or the class of persons to which she belongs—whether it makes sense to think of the defendant as having a duty of care running to the plaintiff. By rejecting this, the Prosserian account eviscerates the concept of duty in negligence law and leaves itself with the impossible task of explaining the policy rationales behind the twists and turns of emotional, economic, landowner, professional malpractice, and nonfeasance case law. It also leaves courts and attorneys with virtually no guidance for balancing the many policy factors relevant to gauging the proper levels of liability.

These are some of the concerns that have been raised recently by several courts and scholars. The Prosserian view endures, however, largely because it has been difficult to generate good alternatives. Prosser's view has also retained its position because it is sensitive to a wide variety of policy considerations and never seems to "miss the boat" too badly; there is always something to say about which policy concerns generate some area of the law that appears to deviate from the norm. Finally, the alternative pictures of the tort law developed by scholars tend to claim superiority over Prosser's view by virtue of normative superiority,<sup>60</sup> structural integrity,<sup>61</sup> or theoretical elegance,<sup>62</sup> but not by virtue of a better accounting for the nooks and crannies of tort doctrine.

In what follows, I shall try to address all three of these concerns. Drawing upon prior work, I begin by explaining why Prosser's "conceptual" arguments against "duty" are unsound, and sketch an alternative view of duty. This view has proved useful in understanding *Palsgraf*, *MacPherson*, emotional and economic harm cases, and a number of other areas. I focus on the law of liability for legal mal-

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57. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054-55 (N.Y. 1916).

58. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345-47 (Cal. 1976) (in bank).

59. See Goldberg & Zipursky, *supra* note 2, Part IV.B.2.

60. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 540-43 (1972).

61. See Ernest J. Weinrib, *The Idea of Private Law* 18-21 (1995).

62. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

practice and argue that the Prosserian account is entirely unsatisfactory for interpreting the doctrine and concepts in this area of negligence law. A relational account of tort law appears to be not only more satisfactory conceptually, but also more capable of explaining the structure of our actual negligence law.

## II. REHABILITATING DUTY

To some extent, Prosser rejected a substantive role for the concept of duty because, like Holmes, he rejected the notions of right and duty as question-begging and incoherent.<sup>63</sup> Prosser's seminal work on the Hornbook was written during an era of legal realism and utilitarianism in which it could comfortably be assumed, as a matter of course, that whole segments of moral vocabulary were meaningless and conceptually self-serving: they were mere code words for decisions based on other grounds.<sup>64</sup> Courts, attorneys, law professors, and even moral and political philosophers and metaphysicians no longer simply assume the illegitimacy of moral concepts, as Prosser did. Simple hard-headed utilitarianism is not, at the end of the day, a defensible foundation. A wide range of legal theorists have rightly recognized a variety of concepts in the law that have content, meaning, and function, even though they are not reducible to utilitarian ideas.<sup>65</sup> "Duty" cannot be reasonably rejected merely because it sounds moralistic and non-empirical.

Prosser's more powerful arguments are not based on the word "duty" itself, or on any objection to moral concepts per se. Rather, they are based on the idea that "duty" actually does no work, except to generate some limits on liability.<sup>66</sup> A finding of breach itself entails a finding of duty, more particularly, that a duty to act in a non-negligent manner, or the duty to take reasonable care, was breached. If "duty" really means the obligation to take due care, then there is never anything to decide, because a finding of breach always satisfies the duty requirement.

The leading academic exponents of this view were Percy Winfield<sup>67</sup> and Leon Green.<sup>68</sup> Judge Andrews's dissent in *Palsgraf* provides the

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63. See Goldberg & Zipursky, *supra* note 2, Part I.B.2.a.

64. See *id.*; see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 821-22 (1935) (arguing that the classical jurisprudence of concepts should be replaced with the "functionalist approach").

65. See Jules L. Coleman, *Risks and Wrongs* 198-99 (1992); Ronald Dworkin, *Taking Rights Seriously* 14-80 (1977); Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 14-17 (1981); Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. Rev. 1679, 1713-18 (1997).

66. See Prosser & Keeton, *supra* note 1, § 53, at 356-59.

67. See Percy Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 41, 43 (1934).

68. See Green, *supra* note 36, at 1026-35.

best example of this view in the body of tort law.<sup>69</sup> The argument rests not on a rejection of the idea of duty, but on a particular conception of what the duty of due care involves. Andrews explicitly stated that the duty of due care is a duty to the world.<sup>70</sup> Put negatively, it is not a duty to any person or class of persons; it is simply a duty to use reasonable care. Andrews thus rejected Cardozo's *relational* conception of duty in negligence law, whereby the defendant owed a duty to a particular plaintiff or class of persons to which she belonged. In this sense, Andrews's (and Prosser's) conception is *non-relational*.<sup>71</sup>

According to this non-relational conception of duty, negligence—the failure to use due care—is a breach of the only sort of “duty” there is. A finding of negligence entails a finding of duty. What is labeled “duty” is purely a question of *standing*: who, among those injured by the defendant's breach of the (non-relational) duty to act reasonably, may recover for those injuries from the defendant?<sup>72</sup> Thus, it is not surprising that Andrews failed to see the difference between this question and proximate cause.

Let us assume that Andrews was correct in thinking that one could assume there is a non-relational duty to act reasonably. That is not the relevant point for Prosser's redundancy argument against duty. The relevant question is, rather, whether one *must* think of duty non-relationally, or whether one can cogently think of duty “relationally,” as Cardozo apparently did. One certainly can.

Negligence law recognizes a wide variety of duties each person owes to many other persons. Each person owes duties of care to strangers—to take precautions against causing them physical injuries when engaging in potentially hazardous activities (such as driving an automobile, operating a factory, or manufacturing dangerous items). And each person owes a more nuanced set of duties of due care to a wide variety of persons with whom she or he may be connected in more intimate ways, such as airlines' duty to their passengers, teachers' duty to their students, physicians' duty to their patients, accountants' duty to their clients, or manufacturers' duty to their consumers.

Here, the duty of care involves the idea of being obligated or bound to act in a manner that is sensitive to the other's interests. There is substantial overlap between this conception of duty in negligence law and socially shared moral convictions about duty.<sup>73</sup> But there is an obligation-based conception of duty within negligence law that is not purely co-extensive with our moral conception of duty. In answering the duty question, a court must work from within that conception to

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69. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

70. See *id.* at 103 (Andrews, J., dissenting).

71. See Zipursky, *supra* note 2, at 12.

72. See *id.* at 16.

73. See Goldberg & Zipursky, *supra* note 2, Part IV.B.1–2.

retain fidelity to the legal concept, while simultaneously fostering a workable link between the law and the moral and social norms of duty that it reinforces.

Satisfaction of the "breach" element of a negligence claim does not necessarily entail satisfaction of the "duty" element. It is entirely possible that the defendant has breached a duty of due care running to someone other than the plaintiff. As Cardozo emphasized in both *Palsgraf*<sup>74</sup> and *MacPherson*,<sup>75</sup> liability in negligence hinges on whether the duty of due care breached was a duty owed to the plaintiff herself. In *Palsgraf*, a duty was owed to Mrs. Palsgraf—the duty to avoid conduct that unduly risked foreseeable harm to her.<sup>76</sup> This duty was not breached, notwithstanding the defendant's breach of a duty to third parties.<sup>77</sup>

Perhaps Prosser did not see the possibility of a relational conception of duty from a purely conceptual point of view. More probably, he failed to see the appeal of a relational model from the normative point of view. Prosser correctly perceived that Cardozo's sort of view aimed to roll two jobs into one. On the one hand, the duty question seems to relate to wrongful conduct, from which the defendant was obligated to forbear. This captures the issue of whether the defendant may fairly and efficaciously be saddled with liability. On the other hand, the duty question is, for a wide variety of cases, a question about who among those injured by the defendant's wrongful conduct may recover—and is, in this sense, a standing question.

There are all sorts of pragmatic reasons for wanting some classes of plaintiffs to recover but not others. Instead of confronting these questions head on, the relational theorist, like Cardozo, asks whether the defendant's wrongful conduct was wrongful relative to the plaintiff, a breach of the duty *to* the plaintiff. Even if Prosser had recognized this as a cogent and non-circular question (which he did not),<sup>78</sup> he would still have been unmoved by the idea that the answer to the question should determine who can recover. Why should it? Why shouldn't we, instead, look to the policy consequences of liability and read the answer back into the label "duty"? This argument led Prosser to believe that relational duty could not be taken seriously.

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74. See *Palsgraf*, 162 N.E. at 100.

75. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

76. See *Palsgraf*, 162 N.E. at 100.

77. See *id.* at 101. To be sure, it is a delicate question just what the status of these "duties" of negligence law is: are they moral duties, legal duties, social duties, or some blend of the above? For present purposes, it is sufficient to make two points: (1) the question here is, in the first instance, one of positive law as to what courts have actually held about the duties owed by various parties to others; and (2) whether duty is conceived relationally or non-relationally, both the Prosserian model and the view advocated here must equally recognize some place in the law of negligence in which courts actually recognize a duty to use due care—the question of jurisprudential status of this recognition is neutral as to views of the structure of duty.

78. See Prosser, *supra* note 32, at 209-15.

The relational conception of duty in negligence law and, more generally, a relational conception of torts, leaves a broad and important conceptual place for the notion of standing.<sup>79</sup> Whether the plaintiff can sue for an injury she suffered from the defendant's wrong is *not* merely a question of how much liability society can afford. In the first instance, it is a question about what entitles a person to act against another through the state—what entitles a person to a right of action against another. The rule that only one to whom a duty was breached can sue is based on the idea that a plaintiff is not entitled to act against a defendant unless that plaintiff was wronged by the defendant. Having wronged plaintiff is a matter of having committed an act that was a wrong *to* plaintiff. In negligence law, this entails having breached a duty owed to the plaintiff.

It is important to note that what I am calling the “relational conception” of duty encompasses two interrelated aspects that are easily confused. It is both “relational” (as opposed to non-relational) and “relationship-sensitive” (as opposed to relationship-insensitive).<sup>80</sup> To say that it is relational is to say that the duties whose breach generates liability for the defendant is always a duty *to* some person or class of persons; it is not, unlike Andrews suggests, a duty to the world. To say that duty is “relationship-sensitive” is to say that the existence, scope, and nature of a defendant's duties vary with the nature of the relationship between the defendant and the plaintiff. This does not mean that the defendant owes a duty of care only to those with whom one has a pre-existing relationship; as I discuss below, stranger-stranger is a particular category of relationship in which a relatively modest duty of care is owed.

The relationship-sensitivity of duty is essential to explaining many areas of the common law of negligence, including nonfeasance, emotional harm, and landowner liability. Moreover, widely shared moral convictions, quite apart from negligence law, vary the duties we owe to others in accordance with the types of relationships we have with them. My duties to my daughter, to my student, to my neighbor, and to a stranger are all different, even though I do owe all of them a series of duties. In both law and morality, part of what it is to have a sense of duty to certain persons includes assigning very high priority to some of their interests, so that the interests of others are elevated above the give-and-take of daily decision-making.

The relational conception of duty coheres well with a broader picture, which I have called the model of “rights, wrongs, and recourse,” according to which tort law is both more public and more private than the Prosserian view.<sup>81</sup> It is more a matter of public law because the rules announced by appellate courts regarding the “duties” of certain

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79. See Zipursky, *supra* note 2, at 15-40.

80. See Goldberg & Zipursky, *supra* note 2, Part IV.B.1.

81. See Zipursky, *supra* note 2, at 90-93.

categories of persons to others are not simply liability rules. To some extent, these rules are legally adopted norms regarding our obligations to one another: they announce that manufacturers of automobiles are obliged to watch out for users; psychotherapists are obliged to watch out for potential victims; accountants are obliged to watch out for economic harm to investors situated a particular way. In an important sense, however, the relational conception of duty also sees tort law as a more private matter. It recognizes that a right of action is essentially an avenue of civil recourse for a private person who wishes to act against another through the state.<sup>82</sup> In the first instance, the right of action is a publicly respected and facilitated private right to redress a wrong. The need for compensation is not sufficient to trigger a right of action. Rather, the plaintiff is entitled to *redress* from a defendant only if the defendant has wronged her.

These are the essential features of the relational account of duty and the larger model of rights, wrongs, and recourse into which it fits. I have argued elsewhere that his model is superior not only to Prosser's *ad hoc* instrumentalism, but also to prominent versions of law and economics and corrective justice theory.<sup>83</sup> I have not attempted to argue for the normative correctness of that view, or even (thus far) for its interpretive superiority over the Prosserian view. Rather, I have simply articulated the view as a cogent alternative to the Prosserian account of duty and the overarching view of tort law more generally.

### III. THE STRUCTURE OF LEGAL MALPRACTICE DOCTRINE

Legal malpractice doctrine constitutes a subfield of negligence doctrine. The Prosserian model fits this area of the law very poorly. A relational conception better captures our actual doctrine of legal malpractice. This can best be seen by examining the duty and breach requirements of negligence law from both the Prosserian and relational perspectives.

#### A. Duty

This section examines how the Prosserian view of duty differs from the relational view. Ultimately, this section concludes that an analysis of the various aspects of duty under the Prosserian model is fundamentally flawed, as applied to the field of attorney malpractice.

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82. *See id.*

83. *See id.* at 93-98.



### 1. Duty and Relations

The central fact of attorney malpractice is that it is normally only the client who has a cause of action.<sup>84</sup> An attorney's negligence may cause injury to a wide variety of persons, but those persons do not have a cause of action except in limited and specific circumstances.<sup>85</sup> Failure by the attorney to exercise reasonable care toward the client normally creates liability. As numerous courts have explained, attorney liability is based on an attorney's breach of her *duty* to the plaintiff. Until the past few decades, a privity rule therefore applied in attorney malpractice cases and liability ran only to clients.<sup>86</sup> Courts have traditionally held that attorneys are obligated to watch out for their clients' interests, not those of third parties. Thus, the traditional privity requirement in legal malpractice has derived from the more fundamental idea, rooted in our profession's view of itself, that, insofar as attorneys owe duties of care, those duties are owed exclusively to their clients. A tacit premise linking this contention to the privity rule, however, is that liability in negligence is determined by the identity of persons to whom one owes a duty of care and the nature of the relationship one has with those persons. This view is utterly at odds with the "non-relational" view of duty, according to which one's duty of care is not owed to anyone in particular—but perhaps owed to the world.

The importance of relationality is evident in a series of cases in which attorneys were sued for negligently informing clients that they had no cause of action. In *Togstad v. Vesely*,<sup>87</sup> the plaintiffs alleged that the defendant negligently failed to inform them that they may have had a viable medical malpractice claim.<sup>88</sup> The defendant countered that since it did not accept the case or take on the Togstads as clients, there was no duty and no cause of action.<sup>89</sup> The Supreme Court of Minnesota disagreed with the defendant, finding that, in light of the trust reposed in the law firm by the plaintiffs seeking legal advice, there was an attorney-client relation sufficient to ground the duty analysis.<sup>90</sup> Whether the attorney-"potential client" contact is sufficient to ground a duty is a threshold question. Numerous other courts

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84. Restatement (Third) of the Law Governing Lawyers § 74 (Tentative Draft No. 8, 1997).

85. *See id.* § 73(4).

86. *See, e.g.*, Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 490 (4th ed. 1996) ("Historically, attorneys' malpractice exposure for negligence has been limited to their clients."); Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. Tex. L. Rev. 967, 967 (1996) ("The traditional version of the law of lawyer liability says that a lawyer is liable only to those with whom the lawyer is in 'privity.'").

87. 291 N.W.2d 686 (Minn. 1980).

88. *See id.* at 691-93.

89. *See id.* at 691.

90. *See id.* at 693.

have reached the same result as *Togstad*.<sup>91</sup> Despite the clear and uncontested allegation of professional negligence causing injury, the professional negligence must be the breach of a relational duty owed to the plaintiff.

Even in those areas where courts have relaxed the privity rule and permitted a cause of action despite the absence of an attorney-client relation, the "relational" nature of the duty is obvious and prominent; the attorney's role vis-à-vis his client actually entails that he is obligated to care for the interests of the third party.<sup>92</sup> For example, the lender in *Greycas, Inc. v. Proud*,<sup>93</sup> asked the borrower to provide him with an opinion letter stating whether the collateral on a loan was unencumbered by liens.<sup>94</sup> The borrower's attorney provided a letter for the lender that stated that the collateral was so unencumbered.<sup>95</sup> In fact, the opinion was mistaken and the injured lender sued the borrower's attorney.<sup>96</sup> The Seventh Circuit refused to hold that the defendant attorney had no duty to the lender, reasoning that the attorney knew the lender would rely upon his service.<sup>97</sup> Thus, the court concluded that the attorney owed a duty of care to the lender in preparation of this opinion letter, even though the lender was not a client.<sup>98</sup> A similar analysis underlies Cardozo's opinion in *Glanzer v. Sheperd*.<sup>99</sup> There, the court held that because a bean-counter knew both the plaintiff and the defendant were relying upon the accuracy of his counting, he owed a duty to the plaintiff notwithstanding the lack of privity.<sup>100</sup> Prosser's non-relational conception of duty leaves no room for this idea.<sup>101</sup>

## 2. Duty and Obligation

A closely-related point is that "duty" is not simply a code word for who should be able to recover in legal malpractice. To assert that the attorney had a duty to the plaintiff is to assert that the attorney, by

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91. Included among these cases are those in which an attorney prepared an opinion letter for a third party to use in a transaction. See, e.g., *Anoka Orthopaedic Assocs. v. Mutschler*, 773 F. Supp. 158, 166-67 (D. Minn. 1991) (holding that an attorney-client relationship is formed whenever an individual seeks and receives legal advice under circumstances in which a reasonable person would rely on such advice); *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279 (Minn. 1983) (holding that the plaintiff's failure to establish that, but for the attorney's negligence, he would have obtained the bank charter precluded judgement in his favor).

92. See Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 Akron L. Rev. 395, 402-05 (1993).

93. 826 F.2d 1560 (7th Cir. 1987).

94. See *id.* at 1562.

95. See *id.*

96. See *id.* at 1562-63.

97. See *id.* at 1565.

98. See *id.*

99. 135 N.E. 275 (N.Y. 1922).

100. See *id.* at 275-76.

101. See Goldberg & Zipursky, *supra* note 2, Part IV.B.2.

virtue of her being an attorney, was *obligated* to act with a certain level of care toward the plaintiff; indeed, in light of an attorney's fiduciary duties, this obligation is thick and well-developed. The obligation is not necessarily contractual, although contract concepts have certainly influenced this area of the law. Nor is it principally a question of morality. By virtue of professional norms, taking care toward the plaintiff is not simply something the attorney may or may not choose to do; it is something the attorney is *obligated* to do.<sup>102</sup>

The notion of an attorney's *obligation* is strikingly alien to the Prosserian conception of duty. "[D]uty' is not sacrosanct in itself, [it is] only an expression of the sum total of those considerations of policy which lead the law to say that the [particular] plaintiff is entitled to protection."<sup>103</sup> The relational conception does not treat duty as "sacrosanct," in the sense of "immutable" or "transcendental," and it coheres nicely with a pragmatic approach to common law adjudication.<sup>104</sup> But it also does not treat duty as a mere placeholder for a policy decision to open or close the floodgates of litigation. It recognizes that whether an attorney has a duty of due care to another is a decision about the appropriateness of requiring attorneys to be vigilant of not only their clients' interests, but also of the interests of certain third parties. This is a pragmatic decision, but it is only indirectly a decision about liability. Primarily, it is a decision about an attorney's proper relation to other parties, the resolution of which yields an answer to the question about liability.

A clear illustration of this point is provided by the strongest line of cases involving liability to non-clients—those involving beneficiaries of wills. In 1958, the California Supreme Court decided in *Biankanja v. Irving*<sup>105</sup> that the intended beneficiary of a will could sue a notary who had negligently drafted the will. Three years later, *Lucas v. Hamm*<sup>106</sup> extended that holding to an attorney whom the plaintiff alleged had negligently drafted a will, of which plaintiff was an intended beneficiary. In the forty years that have elapsed since *Biankanja*, the majority of states have relaxed the privity rule and permitted intended beneficiaries to recover for attorney negligence.<sup>107</sup>

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102. See Restatement (Third) of the Law Governing Lawyers § 74 (Tentative Draft No. 8, 1997).

103. Prosser & Keeton, *supra* note 1, § 53, at 358.

104. See Goldberg & Zipursky, *supra* note 2, Part IV.B.3.

105. 320 P.2d 16 (Cal. 1958) (in bank).

106. 364 P.2d 685 (Cal. 1961) (in bank).

107. See Restatement (Third) of the Law Governing Lawyers § 73; Prosser & Keeton, *supra* note 1, § 130, at 1008-12; Prosser, Handbook, *supra* note 1, ch. 5; Ronald E. Mallen, *Duty to Non-clients: Exploring the Boundaries*, 37 S. Tex. L. Rev. 1147, 1148-49 (1996). While most courts that have recognized such a cause of action have done so under a negligence theory, some have done so under a third-party beneficiary contract theory. Some jurisdictions have done so under both sorts of principles. This Article is devoted to analysis of the extension of tort principles to attorney malpractice. In any case, even insofar as such actions sound in a cause of action for contract,

Liability to beneficiaries rests, in the first instance, on the idea that attorneys are obligated, by virtue of the nature of the work for which they were retained, to secure for the intended beneficiaries that which the testator intended for them to have. In this context, the attorney's obligation to her client gives rise to an obligation to secure a good for the beneficiaries. That is precisely why such a compelling argument exists that there is a *duty* to these non-clients.

Although the Prosserian model is often invoked to explain the intended beneficiary cases,<sup>108</sup> and the California courts that pioneered this area were indeed heavily influenced by Prosser,<sup>109</sup> careful examination of the Prosserian account reveals its flaws. For example, consider the foreseeability of harm to the plaintiff typically emphasized by the Prosserian approach.<sup>110</sup> Surely those whom a testator intends to inherit are foreseeable victims of the attorney's negligence. However, not only intended beneficiaries will foreseeably suffer; so, too, will all of those who would benefit, directly or indirectly, if the beneficiary were to recover under the will. Such distant foreseeability once seemed far-fetched to lawyers, but for decades California courts have in fact considered foreseeability to stretch quite far.<sup>111</sup> Hence, the foreseeability of harm cannot be the basis of liability—it is wildly over-inclusive.

Similarly, it will not suffice to say that proper enforcement of attorneys' duties requires giving the beneficiary a cause of action, since the testator is by definition dead. This "client-proxy" argument fails for a number of reasons. First, many courts have extended its rationale beyond the estates area to include actions for negligent drafting of trusts or gifts, even where the attorney's client is alive.<sup>112</sup> Second, many courts have actually denied rights of action to persons alleging to be intended beneficiaries who cannot establish with convincing evidence

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it is worth noting that third-party beneficiary theories in contract have never been regarded as a conventional action on contract, and have frequently been treated as having tort-like aspects.

108. See, e.g., *General Foods Corp. v. United States*, 448 F. Supp. 111 (D. Md. 1978) (holding that the defendant was not liable for the plaintiff's economic inconvenience because there was no contract or "special relation" between the two); *Heyer v. Flaig*, 449 P.2d 161 (Cal. 1969) (finding tort liability where an attorney negligently failed to fulfill testamentary directions and breached the duty of due care owed to the intended beneficiaries) *Russell v. Protective Ins. Co.*, 751 P.2d 693 (N.M. 1988) (holding that an injured worker was an intended beneficiary of a contract between the employer and the insurer and was therefore entitled to bring a cause of action against the insurer); *Brammer v. Taylor*, 338 S.E.2d 207 (W. Va. 1985) (applying the Prosserian model to intended beneficiary cases).

109. See *Lucas*, 364 P.2d at 688 n.2; *Biakanja*, 320 P.2d at 18.

110. See Prosser & Keeton, *supra* note 1, § 43, at 280-300.

111. See, e.g., *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 39-40 (Cal. 1975) (evinced an expansive conception of foreseeability).

112. See, e.g., *Donahue v. Shugart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995) (holding that intended gift recipients under a living trust are owed a duty by the lawyer).

that they were intended beneficiaries. These courts are treating the "duty" issue as a threshold and are creating precedent that will deny a cause of action for concededly negligent performance by the attorney.<sup>113</sup> Third, and perhaps most strikingly, the right of action for intended beneficiaries is incredibly under-inclusive relative to the "client-proxy" rationale. In many instances, courts do not permit a right of action by a third party even though an attorney's performance has been negligent and the client is unlikely to sue for a wide variety of reasons. Moreover, clients are faced with a wide variety of disincentives to sue attorneys, even where there has been negligent performance. On the "client-proxy" theory, a much broader range of non-client liability would be found. Perhaps most importantly, an intended beneficiary does not sue to vindicate the client's rights or to ensure attorney-client performance. She sues in her own right.

### 3. Standing and Duty

Prosser's analysis of duty as "shorthand"<sup>114</sup> is a mixed blessing. It entirely misses the core meaning of the idea of duty, yet it at least clearly identifies one of the most important operational roles of the concept of duty: it frequently serves to delimit who does and who does not have standing to sue for an injury caused by an attorney's negligence. Supposedly, standing decisions reflect judgments about how much litigation we can tolerate, how much we want to deter the conduct, how bad it is, and how foreseeable the outcome is from the negligence.

The "who can sue" or "standing" doctrine of attorney malpractice law looks nothing like this, either in word or in substance. Courts' decisions about who can sue are literally decisions about to whom a duty was owed, and by this, courts mean, "to whom an obligation of due care" was owed. The "duty as obligation" question answers the standing question. It is not a question about floodgates, the tenuous connection between the act and the injury, or its unforeseeability. Indeed, in most of the cases in which duty is denied, the injury is entirely foreseeable. The question is really whether it makes sense to understand the attorney's role in such a way that she is obligated to exercise due care toward the plaintiff: in short, whether the relationship is such that the attorney owes a duty to the plaintiff.

A recent decision of the Supreme Court of Michigan nicely illustrates this point. In *Beaty v. Hertzberg & Golden, P.C.*,<sup>115</sup> the plaintiff sued the trustee-in-bankruptcy of a corporation of which her late hus-

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113. See, e.g., *Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536, 539 (Mo. Ct. App. 1995) (citing *Donahue*, 900 S.W.2d at 628-29, and holding that the client's purpose and specific intent to benefit a non-client through the attorney-client relationship is crucial).

114. See Prosser & Keeton, *supra* note 1, § 53, at 358.

115. 571 N.W.2d 716 (Mich. 1997).

band was the majority shareholder.<sup>116</sup> Mr. Beaty's life was insured by two \$1,000,000 policies, with his wife as the beneficiary of one and the corporation as the beneficiary of the other.<sup>117</sup> When the life insurance company refused to pay on Mr. Beaty's death due to non-payment of premiums, both Mrs. Beaty and the trustee-in-bankruptcy (on behalf of the debtor corporation) sued.<sup>118</sup> However, while Mrs. Beaty obtained a settlement of \$600,000, the trustee allegedly failed to raise certain key arguments and lost on summary judgment.<sup>119</sup> Mrs. Beaty, who would have benefitted if the trustee had won an award or achieved a settlement, sued the trustee alleging that his failure to raise the key arguments constituted negligence and legal malpractice.<sup>120</sup> The court rejected Beaty's claims as a matter of law:

It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff. Whether a duty of care exists because of the relationship between the parties is a question of law that is "solely for the court to decide . . ." [P]laintiff failed to identify any duty owed to her by defendants because there was no relationship between the parties that could give rise to either a contractual or a tort-based duty.<sup>121</sup>

#### 4. Conflicts

Perhaps the most interesting aspect of litigation over privity concerns the role of potential "conflicts" in ascertaining the range of duty. Professor Hazard's seminal article on "triangular lawyer relationships" highlights this aspect of attorney duty law.<sup>122</sup> In a variety of scenarios, an attorney may represent a client who bears a fiduciary relationship to a third party.<sup>123</sup> Does that attorney owe any duty to the non-client? The third party is not precisely a client in such cases, but, on the other hand, is a known obligee of a fiduciary duty of the client. The attorney's awareness of the non-client's dependence on his performance of the fiduciary duties certainly elevates the relationship above that which exists between strangers. Professor Hazard recommends that the categorization of the attorney relationship to the non-

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116. *See id.* at 718.

117. *See id.*

118. *See id.* at 718-19.

119. *See id.*

120. *See id.*

121. *Id.* at 723 (citation omitted).

122. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 *Geo. J. Legal Ethics* 15 (1987).

123. For example, this is true of an attorney for an administrator, guardian, trustee, or board of directors. *See, e.g.,* *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (involving an attorney representing union officers); *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976) (involving an attorney representing a guardian).

client should depend on whether the recognition of a duty to the non-client would create a conflict of interest.<sup>124</sup>

This analytical framework is applicable to a number of cases of attorney malpractice involving fiduciary relationships.<sup>125</sup> Conflicts also play into the analysis of duty in many different scenarios. For example, an attorney who represents a party in litigation cannot be sued for malpractice by an adversary in litigation who has been injured by her conduct. The plaintiff in *Friedman v. Dozor*<sup>126</sup> was a physician whom the defendant-attorneys had sued on behalf of their client.<sup>127</sup> He alleged that the attorneys had not adequately investigated the facts and the law before commencing the litigation, and therefore he sought to recover resulting damages.<sup>128</sup> The Michigan Supreme Court rejected the plaintiff's claim, holding that to recognize a duty running from attorneys to their clients' adversaries or potential adversaries in litigation "would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client."<sup>129</sup> A similar rule applies throughout American jurisdictions.<sup>130</sup>

The relational model clearly defines the role of conflict in ascertaining duties to non-clients. An attorney has a duty to prioritize her client's interests over the interests of others and a duty to devote herself to the protection of those interests. This limits the extent to which an attorney can be said to owe a duty of due care to non-clients. There is no problem extending the duty where, as in the intended beneficiary case, the prioritizing of the client's interests likewise prioritizes the plaintiff/beneficiary's interest.<sup>131</sup> Prioritization of many non-clients' interests, however, would be inconsistent with the prioritizing of the client's interests because a conflict will exist between the two.<sup>132</sup>

This makes little sense on the non-relational Prosserian view of duty. Indeed, the whole concept of a conflict among duties is incoherent because there is only a single duty: the duty to engage in reasonable conduct—owed to no one in particular. This non-relational

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124. See Hazard, *supra* note 122, at 27.

125. See John F. Sutton, Jr., *The Lawyer's Fiduciary Liabilities to Third Parties*, 37 S. Tex. L. Rev. 1033, 1033 (1996). For a subtle case study of duty to non-clients in a different context, see Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex. L. Rev. 1095 (1996).

126. 312 N.W.2d 585 (Mich. 1981). For an extended discussion of *Friedman*, see Gerald W. Boston, *Liability of Attorneys to Nonclients in Michigan: A Re-examination of Friedman v. Dozor and a Rule of Limited Liability*, 68 U. Det. L. Rev. 307 (1991).

127. See *Friedman*, 312 N.W.2d at 588.

128. See *id.* at 588.

129. *Id.* at 591-92.

130. See Forest J. Bowman, *Lawyer Liability to Non-Clients*, 97 Dick. L. Rev. 267, 273-74 (1993) (citing *MacKerron v. Downing*, 534 A.2d 359 (Me. 1987)).

131. See Harris K. Weiner, *Defining an Attorney's Duty of Care to Nonclients*, 39 Boston B.J. 16, 16 (1995).

132. See *id.* at 17.

conception of duty utterly relinquishes the possibility of taking seriously a conflict among duties. This, in itself, is fatal to the non-relational account, at least as applied to attorney malpractice.

It might be replied that Prosserians recognize the policy objective of having lawyers remain devoted to their clients. When courts decline to recognize a duty to a non-party for "conflicts," their true rationale is this: attorneys who feel the possibility of liability to third parties will sometimes refrain from acting in the client's best interests. That is an undesirable result, in light of the given policy preferences which prioritize attorney commitment to the client. Therefore, liability to third parties should be denied. Courts that decline to recognize "duties" to third parties are merely responding to the hazards of divided loyalty. "Duty" is still a mere "code" for a policy analysis focused on the effects of imposing liability for a certain class of cases.

This reply simply buries the problem more deeply, and tricks us into thinking we can finesse relational duty. But it is precisely the emphasis on a relational duty that supports this entire view. Its crucial premise is that the attorney's duty to her client must be prized above all, and that a weakening of this relationship is not warranted by the benefits of holding attorneys responsible to third parties for their failure to use due care.<sup>133</sup> The analysis of the mechanism through which tort law effects behavior is certainly Prosserian, and the standing analysis therefore appears freed from "duty" in the sense of obligation. But the analysis only works insofar as it smuggles in certain assessments of the value of having attorneys conduct themselves toward one sort of group (their clients) as opposed to others (certain non-clients).

The "conflict-of-interest" argument against duty is expressed in its most extreme version where the plaintiff is an adversary in litigation, but it also plays a role in many different areas of duty law. For example, some of the courts that have denied liability to intended beneficiaries, or have declined to extend the *Lucas v. Hamm*<sup>134</sup> analysis to contexts such as gifts and trusts, have done so on the basis of a conflict-of-interest theory. A prominent and recent example of such an analysis is the Texas Supreme Court's controversial rejection of liability to alleged intended beneficiaries of a trust in *Barcelo v. Elliott*.<sup>135</sup> The plaintiffs in that case were the grandchildren of a deceased client, Frances Barcelo, who had allegedly intended to create and fund a trust, with most of those assets to proceed to the grandchildren upon her death.<sup>136</sup> The trust was not amply funded during Barcelo's lifetime; moreover, two of her children successfully challenged the valid-

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133. Lief Kjeht Rasmussen, Note & Comment, *Abolishing the Privity Doctrine in Texas—Just Do It!*, 2 Tex. Wesleyan L. Rev. 559, 590 (1996).

134. 364 P.2d 685 (Cal. 1961) (in bank).

135. 923 S.W.2d 575 (Tex. 1996).

136. See *id.* at 576.



ity of the trust after she died.<sup>137</sup> The court accepted the attorney's argument that no duty was owed to the grandchildren, largely on conflict-of-interest grounds:

The present case is indicative of the conflicts that could arise. Plaintiffs contend in part that Elliot was negligent in failing to fund the trust during Barcelo's lifetime, and in failing to obtain a signature from the trustee. These alleged deficiencies, however, could have existed pursuant to Barcelo's instructions, which may have been based on advice from her attorneys attempting to represent her best interests. An attorney's ability to render such advice would be severely compromised if the advice could be second-guessed by persons named as beneficiaries under the unconsummated trust.<sup>138</sup>

The Supreme Court of Texas took an unusually hard line on both the single-mindedness required of an attorney and the effect a potential conflict-of-interest should have on a whole class of obligations and potential causes of action. A more lenient court might not hold an attorney liable for the client's failure to channel funds to those beneficiaries even when he is aware of the identity of intended beneficiaries, unless there is clear and convincing evidence that the client intended particular funds to go to particular beneficiaries, made that intention known to the attorney, and relied on the attorney to make that happen.<sup>139</sup>

Ironically, one of the sources of confusion in professional malpractice law comes from a case that hinges on a similarly demanding view of professionals' duties to their clients, and a similarly cautious view of conflicts of interest. *Ultramares v. Touche, Niven & Co.*<sup>140</sup> is a classic Cardozo "duty" decision involving an accountant's liability to third parties.<sup>141</sup> The New York Court of Appeals held that investors who relied upon the accountant's negligent misrepresentations in an audit could not recover from the accountant's firm because of lack of privity.<sup>142</sup> At one point in the opinion, Cardozo stated: "If liability for negligence exists, a thoughtless slip or blunder, the failure to deter a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>143</sup> Prosser interpreted this statement to mean that the rationale for denying "duty" was a fear of opening the floodgates of liability.<sup>144</sup> Actually, the very next sentence of the opinion indicates quite the opposite: "The hazards of a busi-

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137. See *id.*

138. *Id.* at 578.

139. See generally Sutton, *supra* note 125, at 1048-53 (discussing lawyers' fiduciary duties to non-clients).

140. 174 N.E. 441 (N.Y. 1931).

141. See *id.* at 442.

142. See *id.* at 444-48.

143. *Id.* at 444.

144. See Prosser & Keeton, *supra* note 1, § 107, at 745-47.

ness conducted on these terms are so extreme as to enkindle *doubt whether a flaw may not exist in the implication of a duty* that exposes to these consequences."<sup>145</sup> According to Cardozo's view, that massive liability would flow from a finding of duty provides *reason to suspect there was a flaw in the argument for the existence of duty*; in other words, a finding of massive liability is a mere indicator that a proper analysis would lead to a conclusion of no duty.<sup>146</sup> Massive liability is not itself a reason for finding that there is no duty.<sup>147</sup>

Interestingly, Cardozo ultimately adopted an analysis that did not yield the absurd conclusion of massive liability, and whose credentials were independently established. He made this argument from the relational nature of duty and explicitly invoked not only accountants, but also lawyers:

Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with the knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and advisor. . . . Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors.<sup>148</sup>

The nub of this argument lies in conflict of interest. According to Cardozo's view, to hold that there is a duty to each of the plaintiffs puts the professional in a position of serving two masters—the client and the public who will rely on the document—in a context (unlike the “near” privity cases) lacking specific contact to harmonize the expectation of each. For Cardozo, this is not simply a policy or fairness-based argument: it is incoherent to announce that the professional's duty of care is owed to both, in absence of any reason to believe that they will harmonize.

At their core, these cases recognize the importance of an attorney's duties to his clients, acknowledge that duties to non-clients sometimes conflict with proper respect for the attorney-client relation, and leave adequate protection for those duties in elaborating the law of attorney

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145. *Ultramares*, 174 N.E. at 444 (emphasis added).

146. *See id.* at 444-48.

147. This is rather like a judge stating that the absurdity of a particular reading of a statute suggests that the legislature did not intend a statute to be so interpreted. Such a statement, while initially appearing to focus on statutory text, would be a manifestation of the judge's intentionalist view of statutory interpretation.

148. *Ultramares*, 174 N.E. at 448.

malpractice. Our profession's self-understanding has evolved, in recent decades,<sup>149</sup> so that *Barcelo's* unwillingness to take a narrower path toward preserving the attorney-client relation, and its failure to recognize the salience of intended beneficiaries for the estate attorney's obligations, strikes most courts and scholars as too cramped—an assessment I share.<sup>150</sup> This view merely acknowledges that courts ought to recognize an attorney's obligation to non-client beneficiaries, both because of and in spite of her duties to the client.

### B. Breach

Predictably, all jurisdictions require that attorneys live up to a standard of reasonable care.<sup>151</sup> Breach is deviation from that standard. In

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149. See, e.g. *Prudential Ins. Co. of Am. v. Dewey Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (N.Y. 1992) (relaxing the privity requirement for attorney malpractice in New York—at least in near-privity relations—despite purported adherence to *Ultramares*).

150. A closely related point is succinctly stated by Professor Hazard:

In many situations, giving legal protection to a person who is a nonclient does *not* compete with protecting the interests of the lawyer's client or restrict the freedom of the lawyer to take legitimate initiatives on behalf of a client. On the contrary, according protection to the nonclient against the attorney's misfeasance or malfeasance is often consistent with, and indeed a fulfillment of, the welfare of the lawyer's client.

Hazard, *supra* note 86, at 986.

151. See Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 187 (2d ed. 1994) (“[S]tandard of care is determined by the skill, knowledge and diligence brought to bear on similar matters by a lawyer of ordinary competence.”). The precise standard differs slightly from state to state. See *Bernard v. Las Americas Communications, Inc.*, 84 F.3d 103, 109 (2d Cir. 1996) (holding that, under District of Columbia law, an attorney breaches her duty if she “fails to perform with reasonable skill,” which is the skill an attorney must display “to avoid tort liability” (citation omitted)); *Focus Inv. Assocs. v. American Title Ins. Co.*, 992 F.2d 1231, 1239 (1st Cir. 1993) (holding that a plaintiff in Rhode Island must prove “want of ordinary care and skill” by an attorney (citations omitted)); *Hart v. Comerica Bank*, 957 F. Supp. 958, 981 (E.D. Mich. 1997) (obligating an attorney to “use reasonable skills, discretion, and judgment in representing clients, thereby assuming a position of the highest trust and confidence”); *Wehringer v. Powers & Hall, P.C.*, 874 F. Supp. 425, 427 (D. Mass. 1995) (stating that “an attorney who is *not* a specialist owes his client a duty to exercise the skill and care of the average qualified practitioner” (citation omitted) (emphasis added)); *McClung v. Smith*, 870 F. Supp. 1384, 1391 (E.D. Va. 1994) (charging the attorney with “the obligation to use a reasonable degree of care, skill and diligence in handling the matters entrusted to them”); *Resolution Trust Corp. v. Holland & Knight*, 832 F. Supp. 1528, 1530 (S.D. Fla. 1993) (stating that an “attorney’s reasonable duties include duty of care, which requires an attorney to have the knowledge and skill necessary to confront the circumstances of each case”); *Mylar v. Wilkinson*, 435 So. 2d 1237, 1239 (Ala. 1983) (requiring “an ordinary and reasonable level of skill, knowledge, care, attention and prudence common to members of the legal profession in the community” (citation omitted)); *Baird v. Pace*, 752 P.2d 507, 509 (Ariz. Ct. App. 1987) (requiring an attorney to “act for his client in a reasonably careful and skilled manner in view of his special professional knowledge”); *Pugh v. Griggs*, 940 S.W.2d 445, 447 (Ark. 1997) (finding an attorney liable if she “fails to exercise reasonable diligence and skill on behalf of the client” (citation omitted)); *Schmidt v. Pearson, Evans & Chadwick*, 931 S.W.2d 774, 778 (Ark. 1996) (holding that a plaintiff must prove that an attorney’s conduct “fell below generally accepted standards of

practice and that this conduct proximately caused the plaintiff damages"); *Wiley v. County of San Diego*, 68 Cal. Rptr. 2d 193, 201 (Ct. App.) (holding that a breaching attorney must have failed duty to "use such skill, prudence and diligence as members of profession commonly possess[ ]" (citation omitted)), *review granted*, 950 P.2d 57 (Cal. 1997); *First Interstate Bank v. Berenbaum*, 872 P.2d 1297, 1300 (Colo. Ct. App. 1993) (holding that an attorney must "employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out services for his client"); *Bent v. Green*, 466 A.2d 322, 325 (Conn. Super. Ct. 1983) (holding that an attorney is to exercise the same level of care, skill and diligence which other attorneys in the same or similar locality and in same line of practice would have exercised in similar circumstances); *Hill Aircraft & Leasing Corp. v. Tyler*, 291 S.E.2d 6, 12 (Ga. Ct. App. 1982) (holding that the question on the issue of the required degree of care and skill is "whether or not such attorney exercised a reasonable degree of care and skill under the circumstances"); *O'Neil v. Vasseur*, 796 P.2d 134, 139 (Idaho Ct. App. 1990) (analyzing an attorney's implied contract to represent clients with "ordinary skill and knowledge" compared with express contract agreement); *Kerschner v. Weiss & Co.*, 667 N.E.2d 1351, 1356 (Ill. App. Ct. 1996) (holding an attorney liable to his client when he "fails to exercise a reasonable degree of care and skill"); *Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995) (obligating an attorney to use "knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances"); *McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830, 837-38 (Kan. Ct. App. 1993) (obligating an attorney to use "ordinary care and diligence in handling cases . . . to use his best judgment, and to exercise [a] reasonable degree of learning, skill and experience . . . ordinarily possessed by other attorneys in his community" (citation omitted)); *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978) (judging an attorney's act by the "degree of its departure from the quality of professional conduct customarily provided by members of the legal profession"); *Burris v. Vinet*, 664 So. 2d 1225, 1229 (La. Ct. App. 1995) (stating that an attorney has "a duty to exercise at least that degree of care, skill, and diligence exercised by prudent attorneys practicing in his community or locality"); *Burton v. Merrill*, 612 A.2d 862, 865 (Me. 1992) (requiring attorneys to practice "with a reasonable degree of care, skill, and dispatch"); *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (stating that a "professional must use reasonable care to obtain the information needed to exercise his or her professional judgment, and failure to use such reasonable care would be negligence, even if done in good faith" (citation omitted)); *West v. Sanders Clinic for Women*, 661 So. 2d 714, 719 (Miss. 1995) (holding that an attorney must be "minimally competent," and "is required to act as a reasonably prudent person with the required knowledge and skill would act in same circumstances" (citation omitted)); *In re Alpers*, 574 S.W.2d 427, 428 (Mo. 1978) (en banc) (holding a lawyer responsible to "act with competence and proper care and to represent a client zealously"); *Clinton v. Miller*, 226 P.2d 487, 498 (Mont. 1951) (holding that an attorney must be held to "use a reasonable degree of care or skill and to possess to a reasonable extent the knowledge requisite to a proper performance of his duties"); *Bruning v. Law Offices of Ronald J. Palagi, P.C.*, 551 N.W.2d 266, 270 (Neb. 1996) (holding that an attorney "impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake" (citations omitted)); *Sommers v. McKinney*, 670 A.2d 99, 103 (N.J. Super. Ct. App. Div. 1996) (holding that "[a]n attorney is obligated to exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill exercise"); *Rancho del Villacito Condominiums, Inc. v. Weisfeld*, 908 P.2d 745, 748-49 (N.M. 1995) (requiring a plaintiff to show "that his or her attorney failed to use the skill, prudence, and diligence of an attorney of ordinary skill and capacity"); *Walter D. Peek, Inc. v. Agee*, 652 N.Y.S.2d 359, 360 (App. Div.) (holding an attorney liable if "conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of his profession" (citation omitted)), *appeal denied*, 681 N.E.2d 1302 (N.Y. 1997); *Rorrer v. Cooke*, 329 S.E.2d 355, 366 (N.C. 1985) (stating that an attorney must repre-

and of itself, this does not contradict the modern-day model of negligence law. But closer examination reveals that current models of breach completely miss the area of attorney negligence.

### 1. Risk-Taking

Leading conceptions of "breach" define it in terms of whether the risk generated is justified by the benefits of the activity in question, or, more broadly, whether the risk of the activity is unjustifiably high compared to its benefits.<sup>152</sup> A starting point for this conception of negligence is that some relatively high risk is taken. The next question

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sent his client with "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake"); *Klem v. Greenwood*, 450 N.W.2d 738, 743 (N.D. 1990) (defining standard of care as the "degree of skill, care, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent attorney in the state" (citations omitted)); *Myers v. Maxey*, 915 P.2d 940, 945 (Okla. Ct. App. 1995) (stating that a plaintiff "must plead and prove the attorney-client relation, a breach of duty arising from the relation, and injury proximately caused by the breach" (citations omitted)); *Childers v. Spindor*, 733 P.2d 1388, 1389-90 (Or. Ct. App. 1987) (in banc) (requiring expert testimony on the standard of care because it may vary); *Fiorentino v. Rapoport*, 693 A.2d 208, 212 (Pa. Super. Ct. 1997) ("An attorney will be deemed 'negligent' when he or she fails to possess and exercise that degree of knowledge, skill and care which would normally be exercised by members of the profession under same or similar circumstances." (citations omitted)); *Norris v. Alexander*, 142 S.E.2d 214, 217 (S.C. 1965) (holding that an attorney "impliedly represents that he possesses the requisite degree of learning, skill and ability, which is necessary to the practice of his profession"); *Wood v. Parker*, 901 S.W.2d 374, 379 (Tenn. Ct. App. 1995) (stating that a plaintiff must show an attorney's conduct "fell below that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction" (citation omitted)); *Schlager v. Clements*, 939 S.W.2d 183, 186 (Tex. Ct. App. 1996) (holding an attorney to the standard of care "which would be exercised by a reasonably prudent attorney, based on the information the attorney has at the time of the alleged act of negligence" (citations omitted)); *Watkiss & Saperstein v. Williams*, 931 P.2d 840, 846 (Utah 1996) (holding that an attorney must use "skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake" (citations omitted)); *Russo v. Griffin*, 510 A.2d 436 (Vt. 1986) (defining the standard of care for an attorney as the "'degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction'" (citations omitted)); *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992) (en banc) (requiring an attorney to exercise the "degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction" (citations omitted)); *Keister v. Talbott*, 391 S.E.2d 895, 898 (W. Va. 1990) (holding that an attorney must exercise "the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances" (footnote and citations omitted)); *Pierce v. Colwell*, 563 N.W.2d 166, 169 (Wis. Ct. App. 1997) (requiring an attorney to exercise "that degree of knowledge, care, skill, ability and diligence usually possessed and exercised by members of the legal profession" in the state); *Peterson v. Scorsine*, 898 P.2d 382, 387 (Wyo. 1995) (requiring a showing that "[an attorney's] representation departed from the standard of care a reasonably prudent attorney would exercise under similar circumstances").

152. See Restatement (Third) of the Law Governing Lawyers § 74 (Tentative Draft No. 8, 1997) (discussing the standard of care attorneys owe to clients).

is typically whether a Hand standard calculation will show that the risk is outweighed.

The "risk-taking" conception of breach does not capture the meaning of negligence in legal malpractice cases. Typical cases involve lawyers missing a statute of limitations,<sup>153</sup> producing a false or misleading opinion,<sup>154</sup> failing to conduct required searches,<sup>155</sup> misdrafting instruments or contracts,<sup>156</sup> and so on. Risk-taking is not a key concept in understanding negligence in these cases. Yet these are all easily understandable, to juries, courts, and lawyers, as instances of negligence, or failure to take due care. This suggests that risk-taking does not capture the notion of breach, at least in this area. *A fortiori*, the Hand standard, as a formula for determining whether the level of risk-taking was permissible, is unilluminating in understanding this sort of negligence.

## 2. Harm to Others

Another troubling aspect of the Hand standard and, more generally, of the Prosserian conception of breach, concerns the relevance of harm to third parties. Both Posner (as an advocate of a Hand standard)<sup>157</sup> and Prosser<sup>158</sup> seem to look to overall social harm when they consider what "reasonableness" requires. Yet in legal malpractice cases, we are often dealing with a zero-sum game. When a defense attorney negligently misses a statute of limitations defense, for example, it may well be beneficial to society in general. It is often unclear whether an attorney's conduct that results in a gain to an adversary and a loss to the client is harmful to society as a whole. And yet this is surely the paradigm of attorney malpractice.

## 3. Diligence

On the positive side, the concept of breach in attorney negligence involves a notion of misperformance, or, perhaps, incompetence. Conversely, the "reasonableness" of a "reasonable attorney" does not seem to connote a *rational balancing* of costs and benefits,<sup>159</sup> nor does it connote a *reasonable accommodation* of liberty and security.<sup>160</sup> Rather, it connotes a "competent" and "diligent" attorney, practicing in a competent and diligent manner.<sup>161</sup> "Reasonable" in this context

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153. See *Skywark v. Isaacson*, 202 B.R. 557, 560 (S.D.N.Y. 1996); *Haussecker v. Childs*, 935 S.W.2d 930, 934 (Tex. App. 1996).

154. See *Rancho del Villacito Condominiums, Inc. v. Weisfeld*, 908 P.2d 745, 748-49 (N.M. 1995).

155. See *Baird*, 752 P.2d at 510.

156. See *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961) (in bank).

157. See Posner, *supra* note 9, at 32.

158. See Prosser & Keeton, *supra* note 1, § 31, at 169-73.

159. See *id.*

160. See Keating, *supra* note 17, at 327.

161. See *supra* note 151 and accompanying text.

warns the jury that the standard of care does not connote extraordinary performance, but rather the performance that conforms to the norm of competence and diligence within the legal community.<sup>162</sup> Diligence and competence, while apparently central to the concept of negligence in attorney liability, have no obvious place within the Hand standard and little place within the Prosserian model of negligence.

#### 4. Community Norms of Conduct

The heart of a negligence case involving attorneys, like one involving physicians, is expert testimony regarding the standard of care in the professional community.<sup>163</sup> With few exceptions, evidentiary rules require the plaintiff to proffer an expert familiar with the practice of attorneys in the defendant's professional community to testify that the defendant deviated from that standard.<sup>164</sup>

The parallel requirement in the much more heavily litigated area of medical malpractice has attracted significant attention.<sup>165</sup> In order to justify the rule, one might point to the heavily scientific nature of medicine,<sup>166</sup> or to the extraordinarily sympathetic cast of medical malpractice plaintiffs, and the concomitant need for some defendant shields. This requirement might also be depicted as an *ad hoc* piece of physician protectionism, which conflicts with the time worn wisdom of *T.J. Hooper v. Northern Barge Corp.*<sup>167</sup> that industry custom is at most probative—but never dispositive—of breach. The parallel requirement of proof of deviation from the community norm (and related evidentiary requirements) has received little criticism or commentary, however, in legal malpractice. This is curious, since the absence of the “scientific expertise” and “sympathetic plaintiff” rationales in law, and

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162. See *supra* note 151 and accompanying text.

163. See *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (requiring expert testimony to establish the relevant standard and whether the defendant complied with that standard); see also *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925 (7th Cir. 1972) (reversing a finding of liability due to the lack of expert testimony); *Dorf v. Relles*, 355 F.2d 488, 492 (7th Cir. 1966) (reciting the requirement of expert witness testimony in medical and attorney malpractice cases); Dennis J. Horan & George W. Spellmire, *Attorney Malpractice: Prevention and Defense* 13-1 to -5 (1988 & Supp. 1988) (discussing *Bonhiver* and *Dorf*).

164. See *Lentino*, 611 F.2d at 480.

165. See e.g., Douglas R. Eitel et al., *Medicine on Trial: Physicians' Attitudes About Expert Medical Witnesses*, 18 J. Legal Med. 345 (1997) (discussing physicians' willingness to testify as experts in malpractice cases).

166. See *Robbins v. Footer*, 553 F.2d 123, 126 (D.C. Cir. 1977) (noting that the plaintiff in a medical malpractice case must generally “present expert witnesses since the technical complexity of the facts and issues usually prevents the jury itself from determining both the appropriate standard of care and whether the defendant's conduct conformed to that standard” (footnotes omitted)); *Tierney v. Community Mem. Gen. Hosp.*, 645 N.E.2d 284, 290 (Ill. App. Ct. 1994) (stating that the appropriate standard of care in a medical malpractice case is determined by the trier of fact after considering expert testimony on the issue).

167. 60 F.2d 737 (2d Cir. 1932).

the obvious opportunity for attorney protectionism, would seem to call for an even more persuasive critique of such rules for legal malpractice.

It is no surprise that Prosserian scholars would find such rules *ad hoc*.<sup>168</sup> For the Prosserian, breach depends on whether the risk taken is socially justifiable. What the professional community regards as appropriate or inappropriate risk-taking may well be probative of this, since the relevant community has, in some sense, experience and wisdom in making its judgment on this issue—a judgment that should be listened to. But that is the most that can be said about it. Yet the central and not merely evidentiary use of expert testimony on standard of care is a substantial part of our negligence law, not only in medical cases, but in attorney cases, probably accounting cases, and possibly in a wide number of other professions. From an interpretive perspective, the Prosserian model again fails to capture an important aspect of this law.

The relational interpretation of negligence law, however, leaves room for a nuanced account of the place of custom in determining “breach.” What constitutes “breach” is plainly related to the nature and scope of the duty that is at issue. In attorney malpractice law, for the most part, the duty allegedly breached is that of the attorney to her client. As already discussed, the duty of due care to the client cannot be reduced to notions of risk, because competence or diligence is the focal point.<sup>169</sup> The law’s requirement of expert testimony on the standard of care reflects a certain understanding of the concept of competence, which presupposes a professional norm against which it is measured. In other words, whether someone has performed competently in her profession cannot be judged in the abstract; we must know what is reasonably expected of persons in that profession. To know what is reasonably expected of persons in the profession, one must know what the professionals are capable of doing, and also what typically *is* expected of them by the community.

This account makes the professional norm relevant in a manner that is more direct than the Prosserian model. According to the Hand standard, whether there was a breach ultimately depends on an evaluation of the optimal level of risk-avoidance, and custom is relevant only because it incorporates certain persons’ judgments about that issue. When a particular expert testifies about the standard of care, that testimony is doubly indirect: first, the testimony may or may not reflect what the standard of care really is; second, the standard of care is itself only a set of judgments about the optimal risk level. According to the relational model, testimony as to standard of care is only one step removed from the ultimate fact question. An expert’s testimony

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168. See Prosser & Keeton, *supra* note 1, § 33, at 194.

169. See *supra* Part III.B.



may or may not be believed or be accurate, but the expert is speaking directly to the issue: whether the defendant's performance reached a level of competence, a level to which professionals in this area may be expected to reach. Thus, this account better matches our actual law of attorney malpractice (and professional malpractice generally), which gives expert testimony an essential role in the determination of breach.

At the same time, the relational account does not insist that any particular testimony, or any particular custom be dispositive on the question of breach. As in all areas of the law, attorney malpractice involves delicate questions regarding the level of specificity and the level of generality at which certain practices or customs are specified.<sup>170</sup> While particular customs may seem to insulate the legal profession in a particular community against liability, a jury is always free to decide that there was a breach if those customs are inconsistent with broader patterns of attorney diligence.

The actual law of attorney malpractice does not resemble the Prosserian picture of negligence law with unreasonably risky conduct causing injury and with proximate cause and duty as jury-based and court-based limitations in the backdrop. The relationship between the defendant and the plaintiff really matters as to whether there is a duty and, if so, what its contours are. It also matters as to whether the plaintiff can recover. Existence of breach depends, for the most part, not upon whether there was risky conduct, but upon whether the attorney lived up to the standards of her profession. The standards of the profession, rather than an abstract standard of total social harm, provide the measure of compliance with the duty. In all of these central respects, a relational model is superior in its interpretation of the concepts of legal malpractice.

### C. *The Impact of Attorney Malpractice Law on the Legal Profession*

An emerging body of legal scholarship has begun to focus on the interdependencies of legal and social norms.<sup>171</sup> While the "breach" standard in the law of negligence has been portrayed by some scholars as a remarkably clear example of economic rationality entering the law and redirecting ordinary social conduct so that individual economic rationality leads to aggregate well-being, the analysis above suggests roughly the reverse. The "breach" standard is an explicit incorporation of social norm into the law, codifying what we ordinarily

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170. See, e.g., Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 73-80 (1991) (discussing the concept of generality with respect to Constitutional interpretation).

171. For a good overview of, and contribution to, the norms literature, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

expect of one another, and using these norms to guide decisions about when liability may be imposed. To this extent, the relational account of negligence law joins the legal-norm scholarship that has recognized the significance of social norms in giving content to legal norms. Indeed, given that negligence law is one of the core areas of common law, and the standard of "ordinary care" one of its most conspicuous components, the theory I have sketched suggests that negligence law may be a prototypical example of an area where the content of the law is derived, in substantial part, from extant social norms.

Our exploration of the "duty" issue pointed to a related phenomenon. Recall that juries are required to look to expert testimony on standard practice in order to decide whether there should be a legal conclusion that the duty of care was breached; this made sense because the jury was deciding whether the attorney should be regarded as complying with her professional norm of due care. Similarly, however, judges (rather than juries) must decide the "duty" issue. While they do not necessarily receive expert testimony in the same manner, they nevertheless, through appellate briefing and through their own familiarity with an attorney's role, attempt to arrive at a conception of where the attorneys' duties lie that is both normatively justifiable and commensurate with the profession's current understanding of itself and its role. In a sense, courts try to "pick up" a tenable conception of how far an attorney could see her own "care" extending while retaining an appropriate interaction with her clients; similarly, courts try to ascertain how far a lawyer's duties must be considered to extend, and to whom, given the level of dependency seen in children, wards, incompetents, family members, and relying third parties. This is not simply because courts are more likely to get an accurate answer to their questions about the scope of duties if they consult the public culture of attorneys. It is also because, in announcing a duty, courts are in fact articulating, reinforcing, and altering a pattern of norms that guide members of the profession; that is, in part, what duty decisions in negligence law actually do.

If this is correct, then the impact of attorney malpractice law on the legal profession is much more subtle than one might have thought according to the Prosserian model. To be sure, attorneys will be more wary of certain kinds of conduct, transactions, and harms if a court has announced that they are potentially liable for them—and courts anticipating such reactions may craft liability rules with this effect in mind. But our norms may guide in a different way, for they are not mere liability rules. The courts, in announcing duties, are fleshing out and solidifying norms to guide attorney conduct with others, besides their clients', interests in mind. Conversely, the courts are preserving for attorneys the possibility of directing their attention to their clients.

Both interpretive and prescriptive implications flow from the recognition that "duty" announcements by courts serve to guide attorneys.

I have already argued that such announcements help us to understand why there are many categories of third parties, most obviously a client's adversaries, for whom injury inflicted by the attorney will not be actionable. The structure of our negligence law is such that courts cannot impose tort liability without articulating that the defendant has a duty to take ordinary care toward the injured party. In the case of the adversary, this is simply not tenable as a rule of guidance, because it is incompatible with loyalty to one's own client. This interpretive point leads rather naturally to a prescriptive one: courts should not be willing to hold that liability exists to a certain category of non-clients unless they are also willing to articulate a norm that would guide attorneys to regard themselves as owing duties of care to those parties. Courts should not take this extra step, however, unless they are willing to guide attorneys to set vigilance of the interests of this sort of non-client alongside the range of duties the attorney owes to her client, as well as the duties she has as a member of the bar and the legal community more generally. Hence, it is both understandable and appropriate that, in assessing the contours of an attorney's liability to third parties, courts should be involved in the incremental task of articulating the duties of an attorney to third parties.

#### IV. CATEGORIES VERSUS BALANCING

Torts professors (and attorneys generally) are fortunate that a current and comprehensive account of "duty to non-clients" now exists in the Proposed Restatement of the Law Governing Lawyers. As anticipated by most of my examples above, the Restatement provision reads as follows:

##### § 73. DUTY OF CARE TO CERTAIN NON-CLIENTS

For purposes of liability under § 71, a lawyer owes a duty to use care within the meaning of § 74:

- (1) to a prospective client, as stated in § 27;
- (2) to a non-client when and to the extent that:
  - (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services, and the non-client so relies, and
  - (b) the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
- (3) to a non-client when and to the extent that:
  - (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; and
  - (b) such a duty would not significantly impair the lawyer's performance of obligations to the client, and the absence of such a duty make enforcement of those obligations unlikely;
- (4) to a non-client when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
- (b) circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the non-client is not reasonably able to protect its rights; and
- (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.<sup>172</sup>

Interestingly, however, the Restatement provision sounds nothing like the account famously articulated by the California Supreme Court in *Biankanja*<sup>173</sup> and *Lucas*.<sup>174</sup> That account presents a multiplicity of factors: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.<sup>175</sup>

Several other states have also described their approach as "factor-balancing."<sup>176</sup> A methodological divide thus exists between what the Restatement actually says and what several leading courts say, theoretically, about this issue. More importantly, the Restatement approach accurately describes the pattern of law that exists, but does so without a "balancing factor" gloss. Indeed, the Restatement categorizes the duty in terms of relationship and context types, while the multi-factor test takes a non-categorical balancing approach.

The discussion in parts I, II, and III of this Article suggests both why this divide exists and how it should be treated. Courts—particularly the California Supreme Court—have been persuaded that there could be nothing to the duty issue but an *ad hoc* policy test, because they have been persuaded by the Prosserian non-relational approach—their "theoretical framework," on reflection, has been Pros-

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172. Restatement (Third) of the Law Governing Lawyers § 73 (Tentative Draft No. 8, 1997).

173. *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (in bank).

174. *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (in bank); see *supra* notes 106-08 and accompanying text.

175. See *Biakanja*, 320 P.2d at 19.

176. See, e.g., *Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (adopting the balancing approach set forth in *Biankanja*); *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995) (en banc) (adopting the modified balancing approach set forth in *Lucas*); *Petrillo v. Bachenberg*, 655 A.2d 1354, 1357 (N.J. 1995) (balancing an attorney's duty to represent his client vigorously against the duty not to provide misleading information).

serian. On the other hand, the pattern of "duty" cases that have in fact been decided in California and elsewhere reveals that certain issues take center stage. This is typically a consideration about whether the nature of the relationship, given the context and the potential for conflicts of interest with the client, was such that the attorney should be regarded as having an obligation to be vigilant of the non-client's interests.<sup>177</sup> It is, therefore, not at all surprising that the answer to the question depends on the category of the relationship and context at issue. Intended beneficiaries in a trust and estate context are owed obligations, both because a duty to watch out for their interests is generated by the primary duty, and because of the absence of conflict.<sup>178</sup> Similarly, a duty is owed to those whom the attorney knows will rely on his representations in an opinion-letter context. For the same reasons, adversaries in litigation are owed no obligation of due care. As in any area of the law, there are points of uncertainty and nuance in malpractice cases. A lawyer or a court evaluating duty, however, will take a categorical approach generated by relationship types over a multi-factor balancing test.

The categorical approach has several merits over the balancing test. First, it is clearer for courts. Attorney malpractice law has developed in quite an even manner. There has been a gradual relaxation of the law, but it has been smooth, unmarred by fitful turns (as in the emotional distress cases) or by wild and frivolous litigation. On the other hand, the areas of liberalization have been substantial: both the trusts-and-estates and the opinion-letter contexts have expanded enormously. Though more liberal is not always better, the "categorical" approach has the virtue of coherence and consistency without the vice of stagnancy.

The categorical approach is also superior for lawyers in three respects. First, it endows litigators who need to consider bringing, defending, or briefing such cases with a greater sense of where there is an action and where there is not. Few will sue the attorney of a client's former adversary, while litigation in the estate context appears promising in many jurisdictions. Second, it enables attorneys counseling their professional clients—sometimes attorneys—to identify those to whom an enforceable legal obligation of due care is owed, and to whom liability might ultimately exist. For example, such knowledge would be important for a client contemplating performing legal services in a transaction where several parties are relying on those services. Third, it informs attorneys about what our enforceable legal obligations of due care are to non-clients, to a far greater degree than the balancing-test approach.

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177. See Bowman, *supra* note 130, at 270-71.

178. See *id.* at 274-75.

To appreciate the analytical superiority of the categorical approach offered by the Restatement, one must consider just what the so-called "factor-balancing" approach really says. Among the factors to be considered are the "foreseeability" of the harm, the act's potential to cause harm, and the blame attached to it. These three factors are all considerations generally given to the jury. They are, in significant part, considerations of whether the defendant was really negligent and whether that negligence was the proximate cause of the injury. It is therefore completely obscure why, in such a case, these are really questions for the court. By giving the court these factual questions, one empowers the court to recognize, or to decline to recognize, a cause of action against the defendant, based typically on a cold, underdeveloped record. Thus, we would not be able to expect consistency in this area if courts truly adhered to this approach (as some courts do, for example, in the economic injury case law).

My conclusion is therefore somewhat paradoxical. The Restatement has, in fact, missed the general Prosserian approach and failed to describe fully what some of the most important cases have expressly stated as their methodological standard. This is fortunate, however, because my arguments here suggested that the Prosserian approach suffers from serious substantive and process-oriented shortcomings. Most courts that actually confront attorney malpractice cases have been guided by a relationship-sensitive, categorical approach that better conforms to the underlying concepts of attorney malpractice and negligence law.

#### V. LEGAL MALPRACTICE AND THE STRUCTURE OF NEGLIGENCE LAW

I have argued above that legal malpractice law should not be interpreted along Prosserian lines but, instead, should be understood in terms of a relational conception of duty within negligence law. According to this view, the duty of due care is owed to persons or classes of persons. The existence and scope of the duty depends on the person or persons to whom it is owed; it is sensitive to the nature of relationships between parties and the institutional settings within which the parties are found, but is not exhausted by the attorney-client relationship. This relational duty, rather than a grab bag of liability rules based on policy considerations, determines standing. Moreover, "breach" is determined by whether the attorney has performed competently and diligently, rather than according to the Hand standard, or even to the level of risk-generated.

The foregoing conception of duty is the core of duty within negligence law as a whole. Although this Article is devoted to attorney malpractice, its arguments address a broader scope of cases. This section addresses a large and obvious objection to this argument: namely, that attorney-malpractice law is rather different from the re-

mainder of negligence law. It is at the periphery, not at the core, or perhaps it is not really negligence law at all. Perhaps, indeed, the poor fit between the Prosserian model and attorney-malpractice law tends to show not that the Prosserian model poorly fits negligence law, but that attorney-malpractice law is not representative of negligence law.

There are several responses to this argument. Initially, it is worth noting that I have outlined several areas of negligence law that the Prosserian is forced to put in the periphery, because they do not fit the model. These include a duty to rescue, nonfeasance, emotional harm, economic harm,<sup>179</sup> landowner liability,<sup>180</sup> risk-rule cases,<sup>181</sup> a wide variety of third-party liability cases,<sup>182</sup> and now attorney-malpractice. It should be easy to see that medical malpractice, accountant malpractice, and a wide range of other professional malpractice cases will also closely resemble attorney malpractice and, therefore, will be forced into the periphery of negligence law. This is not a small sliver of negligence law. Nor is it uniform—it spans many different sorts of negligence law and many different kinds of cases.

What is left for the Prosserian to claim as core to the non-relational approach? Three large categories of accidental injury include injuries caused by products, automobile accidents, and workplace accidents. It would go far beyond the scope of this article to deal with each of these, but at least a few comments are in order. First, it would be anachronistic, in the year 1998, to take these areas to be the core of negligence law, for each has deliberately moved away from the law of negligence toward a strict liability regime. Thus, injuries caused by products are argued under product liability causes of action,<sup>183</sup> and deviation from the standard of care is no longer the touchstone of liability. In all fifty states, workers' compensation regimes have largely supplanted negligence law.<sup>184</sup> Even in the area of automobile accidents, insurance has, in significant part, displaced the tort law, and no-fault liability is the (partially realized) wave of the future.<sup>185</sup> Those areas where the relational aspect of duty is less obvious are precisely those areas in which negligence law is being supplanted by other legal regimes.

Even apart from these changes, a relational model comfortably fits these areas. Indeed, it is hard to interpret either nineteenth-century employer law, or the more enlightened employer-liability law of this

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179. See Goldberg & Zipursky, *supra* note 2, Part IV.B.2; Zipursky, *supra* note 2, at 30-32.

180. See Goldberg & Zipursky, *supra* note 2, Part IV.B.2.

181. See Zipursky, *supra* note 2, 34-36.

182. See *id.* at 37-40; Goldberg & Zipursky, *supra* note 2, Part IV.B.2.

183. See Restatement (Third) of Torts: Products Liability § 1 (1997).

184. See Stuart M. Speiser et al., *The American Law of Torts* § 6.53, at 258, 259 n.81 (1985).

185. See *id.* § 1.42, at 161; see also Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harv. L. Rev. 713, 716-721 (1965).

century, without recognizing that it focuses upon the sorts of obligations an employer has to *its employees*, and is thus patently relational. An assessment of products liability is not much different. In *The Moral of MacPherson*, John Goldberg and I demonstrate that the advent of manufacturer liability to those not in privity is best explained by the relational model.<sup>186</sup> The Prosserian model cannot provide an adequate explanation of *MacPherson*, the single most important negligence case of this century involving products.<sup>187</sup>

Automobile injuries, like the roadway injuries of the seventeenth, eighteenth, and nineteenth centuries, provide the best case for the Prosserian model. Unlike cases involving attorney malpractice, employer-employee, medical malpractice, or common carrier relations, there is no salient, *pre-existing relationship* between the plaintiff and the defendant in these cases: they are strangers to one another. Yet, if the defendant acts negligently and causes an injury to the plaintiff, the plaintiff may normally recover compensation for those injuries. The defendant has not breached a duty owed only to that specific plaintiff; rather, he has breached the duty to drive carefully that he owes to society as a whole.

Let us assume, for example, that the defendant was driving too fast in order to get to her destination more quickly: the notion of unreasonable conduct may seem connected to the notion of risk-taking unjustified by expected benefits. The Prosserian may expand this paradigmatic case to include a wide variety of injuries, not just on the roads, but in many public areas of commercial and recreational life—not just among individuals, but among companies, government, and other sorts of legal persons. In many of these scenarios, liability exists despite the absence of a pre-existing relationship.

This is how I think the best Prosserian rebuttal to my position would go. But it is based on an equivocation over what it means for negligence law to be essentially relational. To claim that there is a duty owed by the defendant to the plaintiff, which the defendant breaches when he carelessly crashes into the plaintiff, is not to claim that the plaintiff and the defendant had a pre-existing relationship. The duty breached is a duty owed to the plaintiff, regardless of whether there is a pre-existing relationship. The plaintiff belongs to the class of persons who were endangered by the defendant's driving in a careless manner. There was a duty to those persons, and the duty to those persons—including the plaintiff—was in fact breached. The duty does not arise from there having been a special relationship. The duty arises because foreseeable serious physical harm to another person warrants taking care in advance. If there are persons who would suffer that harm, then the defendant ought to act carefully to avoid it.

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186. See Goldberg & Zipursky, *supra* note 2, Part IV.A.

187. See *id.*



This idea indicates both the basis of a duty of care to strangers, and also its rather limited scope.

The idea of relational duties to strangers, duties without pre-existing relationships, is entirely natural in our law. Surely, there is a duty not to batter, defame, or defraud another, notwithstanding the lack of a prior acquaintance or a pre-set relationship. The duty to take reasonable care to avoid causing physical injuries is of just the same sort. Because the duty is owed to the plaintiff, and because only a breach of this duty could give rise to a right of action against the defendant, duty in negligence law—even the law regarding strangers—is essentially relational. I have earlier characterized the duty of negligence law as relationship-sensitive,<sup>188</sup> and this characterization might lead one to believe that duties do not exist in stranger-stranger cases. This would be a mistake flowing from an unjustified assumption that relational duties must be set by voluntary choice or by social role: again, torts like battery show that just the opposite is true. On the other hand, it is a point of enormous importance in negligence law that the scope of one's duty of care does in fact vary with the kind of relationship in question. Not surprisingly, the stranger-stranger category involves a relatively narrow set of duties of care: the duty is ordinary care (as opposed to the highest level for common carriers); there is no duty of affirmative aid; there is no duty to take care not to cause emotional or economic harm. Prosserians typically view these areas as anomalous. The dichotomy between liability in special-relationship situations and non-liability in stranger-stranger cases can only be understood on a relational conception of duty that is relationship sensitive. In this sense, even understanding the contours of liability within stranger-stranger cases requires understanding what is special about *mere strangers* (as opposed to those in pre-established contractual or role-based relationships) and why we have the particular sorts of limits on this category that we do.

If one were to reduce the discussion of relationality to a graphic image, then one might speak of a spectrum of relationship types in tort law, with stranger-stranger relationships—as in automobile accidents—at one end, and highly-developed, well-defined close relationships—as in attorney-client relations—at the other. Attorney-negligence law of the past few decades provides an excellent focus for a general discussion, because the plaintiff-defendant relationships tend to fall in the middle of this spectrum. The failure of these relationships to qualify for the extreme attorney-client relationships (and duty) makes them difficult and challenging for courts. The sort of care attorneys owe to their clients is quite different, and more extensive, than the care strangers owe to other strangers. Indeed, the injuries that plaintiffs attempt to redress—typically, pure economic harm—are

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188. See *supra* Part II.

not actionable within a stranger-stranger relationship. Courts rely on finding an understanding of the relationship category and on deciding whether, given this relationship category the attorney's duty of care extends as far as the plaintiff says. Thus, the law *does not* presuppose a highly structured, pre-existing relationship: rather, it asks the question of how to conceptualize and categorize types and levels of duty within negligence law, even if the prescribed type of relationship does not exist. In this sense, it permits us to see negligence law as pervasively relational, and the adjudication of duty issues as an ongoing enterprise of deciding how far to extend its scope.

Though the "attorney malpractice is unique" objection also reaches the concept of breach, closer examination reveals that it too casts serious doubt on it. The reasonableness standard for breach by drivers and attorneys alike does not easily connect with some reason-based standard for low risk action; it connects with *competent performance*. For the driver to use reasonable care is for the driver to be driving with *ordinary* care. We do not require expert witnesses to present evidence as to what constitutes ordinary care in driving because fact-finders do not need such a foundation—it inheres in their own experience. Though part of what makes certain kinds of driving fall below the standard of ordinary care may be that it is too high-risk, the concept of ordinary care is not a concept of risk, but rather one of competence and diligence.

To summarize, attorney-malpractice law presents a striking body of evidence in favor of the relational conception of duty, and against the Prosserian model. The objection that attorney-malpractice law is atypical of negligence law, because it involves highly specialized, pre-existing relationships, is without merit. First, a vast expanse of negligence law includes such pre-existing relationships and status categories. Second, those areas which seem to involve strangers—such as product liability and automobile accidents—have moved or are rapidly moving away from negligence law. Third, and most importantly, even the category of stranger-stranger cases cannot be adequately understood except against the backdrop of the relational model.

#### CONCLUSION

Reflection upon the different "departments" of legal academia, like any other interdisciplinary study, can be valuable in many different ways. It is often tempting to think that one area is more foundational and the other more particular or applied. In such a context, one expects that the foundational discipline will correct, or at least enlighten, the more applied about the underlying structure of their area. And so in an article of this sort, by a torts professor addressing negligence law as applied to attorneys, one might expect to see contentiousness over what legal scholars have said with regard to attorney malpractice. But in fact, I have taken just the opposite approach. In the case of attor-

ney malpractice, it is the “applied” scholars who have the better answer; the more foundational theorists in torts have been laboring under a misconceived view. By scrutinizing this area of law—indeed, the area of law that applies to ourselves—this Article begins to expose what is wrong with the Hornbook account of negligence law and, more generally, with instrumentalist and economic accounts that grow out of it.

Negligence law is about taking the care toward others that they are owed, according to our legal and social norms. If such a failure results in harm, then it normally generates a right of action, as well as liability for that harm. Problem cases arise where the existence of a right of action is uncertain. For decades, scholars led by Prosser aimed to solve these problems by deciding where liability was desirable and where it was not. This approach, however, misses a crucial step that courts take explicitly and implicitly. In problem cases, we must decide whether the defendant’s conduct really breached a duty owed to the plaintiff. To do so, we must closely examine the relationship among the parties, the institutional or professional setting, and the standards of competence, diligence, and care applicable to the defendant. Like the Prosserian approach, this kind of analysis is not a matter of bowing to history or engaging in abstract moral philosophy; it is a pragmatic and flexible effort to apply the developed concepts of duty and breach in the complex contexts in which they arise.

Duty is relational and relationship-sensitive, while breach is more closely tied to the notion of competence than to the notion of risk. These contentions, comprising what I have called a “relational” model of negligence law, challenge the core of the Prosserian approach, but are absolutely central to attorney malpractice law. Moreover, attorney malpractice law is quite representative of the law of negligence generally, supporting the applicability of a relational model at a broader level.

Finally, it is worth commenting briefly on the larger jurisprudential debate to which this critique of Prosser belongs, for that debate is relevant to current thinking about the legal profession. Prosser’s account of duty as “shorthand” for a list of policy considerations is a prominent example of a widespread “reductionistic” approach to legal concepts championed by Prosser and Holmes before him. Not just duty, but intention, causation, foreseeability, injury, and numerous other concepts in torts were treated by Prosser as thin shells into which a variety of policy judgments could be poured. A large part of what students learn in their first-year common-law courses—torts, contracts, and property—is that legal concepts like duty are mere devices manipulated by lawyers in the service of their clients, and by judges in the service of their favored policy objectives.

The pervasiveness of reductionistic thinking among law students and lawyers is linked, I believe, to the widely-observed cynicism we

now see in the legal profession and, in turn, to a decline in our professional self-esteem.<sup>189</sup> While this cynicism is surely anticipated in the *locus classicus* of legal realism, Holmes's *The Path of the Law*,<sup>190</sup> it is nevertheless a bitter irony that a view constructed, in part, to help lawyers facilitate forward-looking social changes has become a mantra for pessimism and suspicion about the law. A different sort of irony is highlighted in this article, however, insofar as Prosser's "reductionistic" view, which was designed to peel away obfuscatory concepts and reveal the truth about the structure of the law, in fact achieves the opposite. Prosser's reductionism does not explain "duty" or "breach"; it so badly misses these concepts that it precludes any plausible account of the structure of the legal doctrine we actually have. Prosser was right to insist that law must be understood as a human creation responsive to human needs and to insist that the concepts of the common law are not fixed in their content for all time. But this need not lead to the radical conclusion that the concepts of the law have no content or structure, simply serving as conclusory labels for grand underlying policy judgments. This conclusion actually serves to blind us to the structure of the doctrine courts and lawyers are actually using.

Prosser's was a reductionistic pragmatism, but other forms of pragmatism are available. Like Judge Cardozo, I would favor a conceptualistic pragmatism. Such a view would recognize that legal concepts have a structure that constrains and shapes the sorts of moral and political judgments that are found in the law. Grasping that structure—like grasping the relational structure of duty—gives lawyers a genuine understanding of the law. With such an understanding in hand, we will be able to counsel, advocate, and adjudicate the law in a pragmatic manner that is sensitive both to the factual contexts in which legal problems arise and the need for the law to grow with time.

A conceptualistic pragmatism begins with a major advantage over the Prosserian approach, at least in torts: it better interprets our actual law of negligence. But I would like to think it may enjoy an additional advantage: it may permit us to educate our students as modern lawyers sensitive to the "play" in the law and aware of the always-looming policy questions, without breeding the cynicism of the reductionist. For we will no longer be teaching our students the depressing message that there is really nothing to know about the law, that it is all simply policy. We will be teaching them that the challenge of being a lawyer involves the mastery of concepts that have a structure of their own, but a content that extends to human problems, beyond where they can see.

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189. See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 13 (1993).

190. See O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 468-78 (1897).